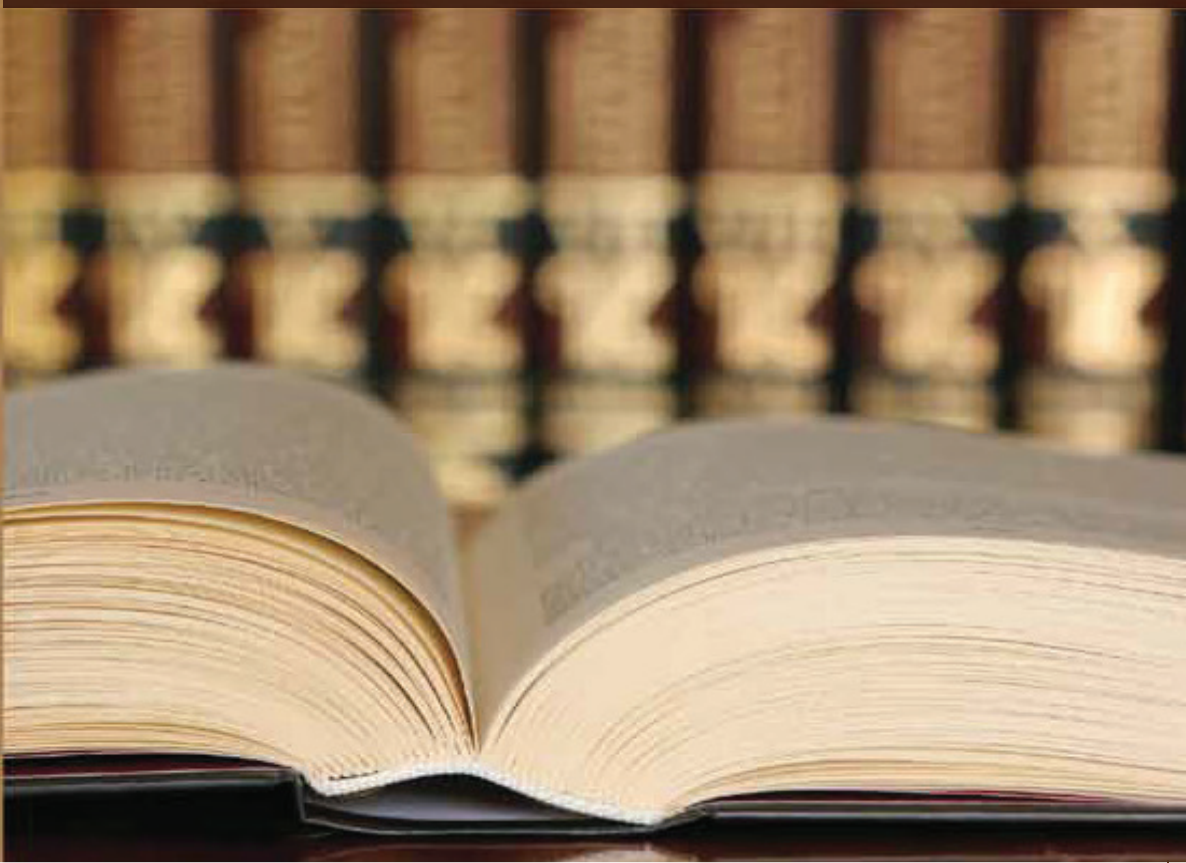


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2010

KANYEIHAMBA'S COMMENTARIES ON LAW, POLITICS AND GOVERNANCE

GEORGE W. KANYEIHAMBA



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COMMENTARIES ON LAW,
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2ND IMPRESSION

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TABLE OF CONTENTS

	<i>Page</i>
Preface	viii
Introduction	x
Section One: Constitutional Theory and Practice	
Chapter One - The Theory and Principles of Constitutionalism and the Rule of Law: Separation of Powers	
1.1 Customary and Colonial Background	8
Chapter Two - The Making and Nature of the 1995 Uganda Constitution	
2.1 The Salient Features of the 1995 Constitution	21
Chapter Three - The Judiciary and its Challenges: Judicial Independence and Accountability in a Democratic Society	
3.1 The Function of the Judiciary	34
3.2 Judicial Activism	35
3.3 Can Uganda Judges Engage in Judicial Activism to Uphold and Protect Human Rights?	40
3.4 Protection of Human Rights by Judges	41
3.5 Judicial Responses to Violation of Human Rights in Uganda	43
3.6 Executive, Political and Military Assault on the Judiciary	47
3.7 Accountability in the Judiciary	51
3.8 Judicial Balancing Act	52
3.9 An Ideal Judiciary.....	55
Chapter Four - The Exercise of Executive Power	
4.1 Tolerance in the Exercise of Executive Power	60
4.2 What Went Wrong?	67

Section Two: Human Rights

Chapter Five - Human Rights: Know Them, Demand Them, Defend Them

5.1	Enforcement of Human Rights and Development.....	75
5.2	Human and Peoples' Rights	75
5.3	The Impact of Foreign Aid.....	82
5.4	knowledge and Protection of Human Rights.....	85

Chapter Six - The Right to Health With Reference to HIV/AIDS

6.1	Definition of the Right To Health.	88
6.2	Misconception About the Right to Health.	90
6.3	Human Rights and the HIV/AIDS Epidemic in Uganda	92
6.4	The Uganda Open Policy Experience	95
6.5	Living With HIV/AIDS.....	100
6.6	Diagnosis and Treatment.....	103
6.7	The HIV/AIDS Test.....	104
6.8	The Cd4 Count.....	104

Chapter Seven - The Death Penalty Debate in Uganda

7.1	Introduction.....	107
7.2	Constitutional Licence	109

Section Three: Governance and Development

Chapter Eight - Weaknesses, Frustrations and Failures of Political Parties in Uganda 117

Chapter Nine - Corruption

9.1	Public Perception of Corruption	127
9.2	Corruption in the Electoral Process	127
9.3	Inability to Act on Corruption	128
9.4	Difficulties in Identifying the Corrupt	129
9.5	Corruption In The Judiciary.....	131

9.6	Professionals and Corruption	135
9.7	The legal Profession	136
9.8	Corruption in other Professions.....	138
9.9	Fighting Corruption.....	139
9.10	The Major Weapon Against Corruption is Circumstantial Evidence	140
9.11	Strengthening the Resolve Against Corruption.....	144
Chapter Ten - Obstacles to African Development		
10.1	The Wisdom of Africa	147
10.2	The Obstacles	149
10.3	The Dependency Syndrome.....	150
10.4	Impact of Foreign Aid, Advisers and Planners on African Development	150
10.5	African Weaknesses in Negotiating Contracts	155
10.6	Consequences of Failure.....	157

PREFACE

Justice Professor Dr. George W. Kanyeihamba is one of the leading jurists in the field of constitutional and human rights law. In the last three decades he has been a key protagonist in the metamorphosis that has seen Uganda emerge from tyranny and lawlessness to the present constitutional and political order. He has contributed immensely and uniquely to this difficult process not only as a Cabinet Minister, a Member of Parliament and a Justice of the Supreme Court but also as the chair of the Legal Committee of the Constituent Assembly that made the country's 1995 Constitution. On the international plane, he has worked as a legal expert on the revision of the African Charter of Human and Peoples Rights. He has been part of several fact finding missions for the Commonwealth Secretariat and the International Commission of Jurists in countries including Kenya and Swaziland. In 2006 he was elected a Judge of the African Court of Justice/Human and Peoples Rights and as a Member of the International Criminal Bar Association council.

A combination of Justice Kanyeihamba's unique experience in the public realm, his scholarship as well as a deep belief in justice democracy and human rights has motivated him to actively lecture and publish on several topics in the constitutional and legal domain. His most renowned work today is *Constitutional and Political History of Uganda, from 1894 to the Present*. Besides this, he has authored several publications that analyze the country's transition from dictatorship to democracy. Many of his recent writings have hitherto been unpublished and hence not easily accessible. This publication consolidates these in one volume and highlights his thoughts on the contemporary hazards on Uganda's road to full democracy.

These essays address three thematic areas namely (i) Constitutional theory and practice – including anecdotes on the making of the 1995 Constitution (ii) Human rights and (iii) governance and development. The work illustrates the hurdles met in the implementation of the 1995 Constitution arising out of constricted political spaces; excessive powers of the executive; a weak and gullible legislature as well as a threatened but resilient Judiciary. Justice Kanyeihamba does not mince words. His criticisms are blunt and lucid. For instance, he points out that the Executive “through its powers of persuasion and the purse has systematically and effectively dismantled the actual powers of Parliament and more or less dictated how those powers will be exercised”. And “the present NRM leadership does not respect the law or rules. It uses power and numbers of its supporters whether genuine or bought to have its way, regardless”. He argues that “the greatest disservice the NRM government has done to Uganda is to accept and encourage monetisation of

and bribery in all public elections”. And that political parties that constitute the opposition lack credibility because they lack internal democracy.

On the subject of the death penalty he argues that it [the penalty] is part of our law and is “ingrained in our culture”. Also that “it may be decades within the third millennium before the subject of the death penalty becomes a serious matter for reform in Uganda”. He fears that in the absence of the death penalty mob justice will prevail. I respectfully differ with the learned Justice on this matter. This is because, his reasons contradict the right to life especially as the death penalty is an irreversible form of punishment with no proven deterrent effect. Also, because it is used by some states to eliminate political opponents. The 1995 decision of the Constitutional court of the Republic of South Africa in the Matter of the *State v T Makwanyane and M Mchunu* confirms first, that the death penalty amounts to torture, cruel and inhuman punishment and, second, that Courts do not need to wait for “the masses to be educated” before they can jettison it. In the most recent case of *Philip Zahura v Uganda (infra)* while declaring the death penalty to be Constitutional, the Constitutional Court held that for a convict to remain on the death row for too long is inhuman and cruel.

This publication is both timely and relevant to the discourse of constitutionalism, human rights and governance in Uganda. It comes when the country has just concluded a costly and lengthy constitutional review and revision. Also, on the heels of the supreme Courts decision to uphold the 2006 Presidential Election – albeit the fact that it unanimously found the said election not in accordance with the Constitution and other laws and, was neither free nor fair. Obviously this and other questions beg for further and deeper interrogation. The essays that follow provide a good point of departure.

I take this opportunity to congratulate Justice Kanyeihamba on this his latest publication and to thank him for granting me the opportunity to write a preface to this work. I am most obliged.

APOLLO N. MAKUBUYA

INTRODUCTION

Uganda's postcolonial governance and constitutional order has been haphazard and difficult. It has largely been characterised by authoritarianism, corruption, the abuse of political, civil, economic, social and cultural rights of its citizens.

With the fall of Idi Amin in 1979, an attempt to establish proper and just governance was made by UNLF but its administration was cut short by military intervention. Then came Obote II which itself was overthrown by the military junta of General Tito Okello.

In 1986, the National Resistance movement, under Yoweri Kaguta Museveni, captured power and promised a fundamental change to the country's political and economic dispensation. For a time, the NRM Government took several strides to restore law and order and to rehabilitate the economy, in 1995 it promulgated a new Constitution that provided a legal substratum for the country's future governance. However, the implementation of the 1995 Constitution became a subject of considerable debate and controversy. The controversies relate to issue on the powers and tenure of the executive; independence of the judiciary; political pluralism, human Rights, Family law; federalism and corruption. The Courts have been called upon to determine several constitutional matters including the legality of Act number 13 of 2001 that sought to amend the Constitution. In 2001, the government appointed a Commission of Inquiry to Review the 1995 Constitution. The process of constitutional review highlighted the most critical constitutional and governance matters of the country. Several of these revolved around the principles of the rule of law, constitutionalism, democracy and human rights. The most critical of them all came to be the NRM determination to lift the constitutional term limit on the Presidency followed by equally controversial and disputed referenda and presidential elections. The essays that follow attempt to address and analyse some of these issues.

CHAPTER ONE

THE THEORY AND PRINCIPLES OF CONSTITUTIONALISM AND THE RULE OF LAW: SEPARATION OF POWERS

The 1995 Constitution of the Republic of Uganda.

During the Idi Amin regime, two gruesome incidents occurred. In a court session, a justice of the high court of Uganda heard a case where a suspect was accused of a relatively minor offence carrying a maximum sentence of five years or a fine. The judge having examined the summary of evidence in the file, concluded that unless additional witnesses gave evidence for the prosecution, the judge could not understand why the accused had been brought before court since the recorded facts and evidence, did not disclose any criminal offence having been committed and the dispute appeared to be a private matter between the accused and some soldiers. A day before the hearing of the case, defense counsel telephoned the judge for private consultations with the judge in chambers. Although the request was unusual, the judge reluctantly agreed to see counsel. Keeping the appointment strictly in time, counsel turned up at the judge's chambers accompanied by two close relatives of the accused. Counsel and the relatives intimated that the soldiers who had arrested the accused had threatened that if the accused was acquitted by court; the soldiers would shoot and kill the accused as soon as he was seen leaving court. The relatives had come to beg the judge not only to convict the accused but also to sentence him to the maximum period of imprisonment permitted by law.

When the trial commenced, the accused pleaded guilty. His counsel had nothing to say in mitigation and the judge sentenced him to five years in prison. Subsequently, the accused and the judge survived the Amin killings.

In another incident, state agents of the same regime warned the late Ben Kiwanuka, then, chief justice of Uganda, not to show mercy to an accused person. The learned chief justice found that the alleged offence was a minor one, which was bailable. He granted bail. He had been previously warned not to be soft on criminals. Thereafter, the chief justice was arrested and manhandled in his own chambers by unidentified security men who forcefully took him from the court and drove him away. He was never found but it is believed that he perished at the hands of the so-called state security agents on the orders of Idi Amin.

We may reflect on those two incidents and wonder what any other judicial officer would have done. There are other dramatic and tragic encounters between judicial officers and members of the other two organs of government, namely, the Executive and the Legislature. Incidentally, the latter's threats and criticisms are usually limited to verbal assaults. However, the former's actions can sometimes be terrible and fatal, as the relatives and friends of sir Thomas Moore of England once sadly found.

The discussion in this paper is intended to show that it is only when each organ of government is permitted to operate within its sphere of influence and with knowledge and consent of the other two that there is mutual respect. It is also when they operate within their respective spheres of influence that democracy, Justice and freedom are fully enjoyed. Failure to achieve this harmonious relationship in society, results in injustice, tyranny and oppression. Although all African countries possess written constitutions and many do have specific provisions granting judicial powers as extensive as possible, relatively few courts are prepared to exercise it in the same manner and even fewer governments are prepared to concede that the judiciary can invalidate their decisions or legislative enactments.

In *Ssemwogerere and Luwum v AG*, Constitutional Application number 3 of 1999 (C.A.), (UR), the petitioners challenged an Act of Parliament as unconstitutional in the constitutional court. The grounds of the petition included, *inter alia*, the allegation that when the Bill in question was allegedly passed, there was no quorum in the house as required by the Constitution, and that the procedure used by the Speaker of Parliament in determining the quorum was in conflict with the Constitution. Until the hearing of this petition, no court in Uganda had had the courage to invalidate an Act of parliament, which dealt with a fundamental policy of the government of the day. In this case, the particular piece of legislation provided for the holding of a referendum on what political system should govern Uganda for the next five years. The government and supporting foreign governments, the World Bank and International Monetary Fund, had invested heavily in the referendum to be held under the Constitution and this particular Act. The eyes of the world were on Uganda. When the matter came up for hearing in the constitutional court, counsel for the Attorney General raised a number of preliminary objections including one, which stated that courts had no jurisdiction to entertain a matter questioning the internal workings and privileges of Parliament.

The constitutional court upheld the objections and dismissed the petition. The petitioners appealed to the Supreme Court where I had the honour to draft and

5

*The Theory and Principles of Constitutionalism and the Rule of Law:
Separation of Powers*

read the lead judgment. We held unanimously, that the constitutional court had erred in divesting itself of the jurisdiction to hear and determine the petition. We directed that that court should hear the petition on merit. There followed a barrage of criticisms from government and its supporters that we had interfered with the sovereignty of Parliament and taken away its privileges and immunities. It is worth noting that the Uganda Constitution provides that the Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda and that any other law or custom which is inconsistent with any provisions of the Constitution shall be void, at any rate, to the extent of inconsistency.¹

One of the issues to be resolved in the petition was whether a citizen is entitled to use *Hansard* as evidence and call members of parliament to give testimony of what transpired in the Parliamentary chamber during parliamentary proceedings. Before this petition, the view was that courts had no jurisdiction to compel the production of *Hansard* to be used or that members of Parliament could give evidence in court proceedings.² The unanimous decision of the Supreme Court of seven justices and of the constitutional court of five justices outlawed the old law, which was derived from the British Constitution where Parliament is still regarded, in many respects, as supreme. Article 41 of the Uganda constitution provides:

- 41(1) “every citizen has a right of access to information in the possession of the state or any other organ or agency of the state except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right to privacy of any other person.
- (2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of this Article and the procedure for obtaining access to that information.”

Justice Kanyeihamba, of the Supreme Court, in the lead judgment stated thus:

“The Attorney General did not show nor am I aware that Parliament has made the necessary law under Article 41(2). In any event, it would have been incumbent upon the Attorney General or Parliament to show that the information to be excluded as evidence in Constitutional Petition number 3 of 1999 came within the exceptions listed in clause (1) of the same Article. In my opinion, while it is still a political necessity for a litigant or a petitioner to write to the state, or ‘organ or it’s agency in possession of information for obtaining that information. Once that information is obtained, with or without the

1 Uganda Constitution Article 2(1) and (2).

2 Constitutional Appeal number 1 of 200 at page 11 of his judgement.

3 Section 15 of the National Assembly (powers and privileges) Act, Chapter 249, *Bradlaugh v Gosset*, (1884) 7 QB2’ and *Picken v British Railways Board*, (1974) AC 765.

cooperation of the state or organ or agency concerned, the information so obtained is freely usable and admissible in courts of law unless it falls within the exceptions under Article 41(1). Moreover, where the state refuses to release such information, the citizen entitled to receive it may take the necessary legal steps to compel its release. In my view, the state organs or their agencies include Parliament, the Executive and the Judiciary and any of their agencies in their diverse manifestations. Therefore, the constitutional court erred in rejecting the evidence presented by the appellants in support of their petition.”

It is significant to note that on this very point, the learned Chief Justice, Wambuzi CJ, (as he then was), who presided over the court, wrote a different opinion stating that this kind of information was protected by the provisions of section 15 of the National Assembly (Powers and Privileges) Act, Chapter 249, Laws of Uganda and rule 171 of the rules of procedure of Parliament, 1996. The learned Chief Justice concurred with the learned Deputy Chief Justice who presided over the constitutional court when it dismissed the petition on the preliminary objections, in the first place, but was not a member of the five justices who subsequently heard the petition on merit. Following the judgment of the Supreme Court to that effect. Both justices have been on the bench for a long time and witnessed the ghastly consequences of conflict in society, especially if the Executive does not have its will obeyed at all times. They have also seen Parliament get upset and unhappy about court decisions it did not like and listened to members of Parliament who suggest how the Judiciary can be tamed and have its jurisdiction restricted.⁴

Section 15(1) of Chapter 249 provides:

“Save as provided in this Act, no member or officer of the Assembly and no person employed to take minutes of evidence before the Assembly or any committee, shall give evidence elsewhere in respect of the contents of such minutes of evidence or any document laid before the Assembly or such committee, without special leave of the Assembly first had and obtained”.

- (2) The special leave referred to in sub section (1) of this section may be given during a recess or adjournment by the Speaker or, in his absence or other incapacity or during any dissolution of the Assembly, by the Clerk.”

Rule 171 of the Rules of Procedure of Parliament provides:

“No member or officer and no person employed to take minutes of evidence before a committee shall give evidence elsewhere in respect of the contents of evidence or of any manuscript or document presented to parliament or a committee, without prior leave of the committee on rules and privileges.”

4 Constitutional Obligation in Developing Countries in “ Essays on Third World Perspectives In Jurisprudence, Eds. Marasinghe and Conklin, Malayan Law Journal PTE Ltd 1984, pages 59-69.

7

*The Theory and Principles of Constitutionalism and the Rule of Law:
Separation of Powers*

As already indicated, following the judgments in the Supreme Court and Constitutional Court, section 15(1) and rule 171 are no longer good law. They have been held to be inconsistent with the provisions of the Constitution and therefore null and void. As expected, the consequences of these two decisions have strained the relationship between Parliament and the Judiciary, on the one hand, and the Executive and the Judiciary, on the other. Some spokespersons of Parliament see the judgments in the two courts as having undermined the immunities and privileges of Parliament, which courts think, is not the case, while some ministers feel that they cannot reveal state secrets in Parliament anymore. This feeling is not borne out by the historical facts since in the past the Executive has actually refused to reveal information in the Parliamentary chamber, not even in closed sessions, on the ground that to do so would be harmful to national security. They also seem to have internalized the contents of article 41(1) under which sensitive information of Government would be protected from disclosure.

In 1984, I stated in an article that:

“It is not surprising that judicial review of a constitution can lead to a direct clash between the executive and the judiciary, on the one hand, and the legislature and the judiciary on the other. Occasionally, the conflict can only be resolved by one or more of the institutions resorting to drastic measures. Legal systems such as those of the United Kingdom, The United States of America, Canada and Australia usually absorb the consequences of such conflicts without seriously damaging the equilibrium between the institutions of government. In the Third World countries however, the balance is often unhinged or destroyed”⁵

In that Article, I enumerated and discussed some of the cases to illustrate the phenomenon. These cases included *Adegbenro v Akintola*, (1963) AC 614, a Nigerian case, *Republic v Micheal Kamaliza and others*, Cr. Sess. Case number 103 (1970), a Tanzanian case, *Ibingira and others v Uganda*, (1966) EA 306, a Ugandan case. I referred to a spate of litigation in which the conduct of government was challenged and said that while facing reality, the courts tended to uphold the government's stand in almost all the cases by giving the reason that the old legal order had been replaced by a new one through an act of revolution.⁶ Here I had in mind cases such as *Awoonor- Williams v Gbedemal*, Constitutional Case number 1169 of 1969, *Madzimbamuto v Lardner- Burke*, (1969) 2 SA page 282, *The State v Dosso*, (1958), 2 Parkistan Sup. Ct. R. 180, *AK Gopan v State of Madras*, AIR 1950. S.C. 27, *Keshav Madhaur v the state of Bombay*, AIR S.C.J. (1951) 182 and *Shah v*

5 Constitutional obligation in developing countries in “Essays on third world perspectives in jurisprudence, Eds. Marasinghe and Conklin, Malayan Law Journal pte Ltd 1984, page 59.

6 *Ibid.*

Attorney General, (1970) EA 50. In the United Kingdom, a possible conflict between the state and the judiciary which arose out of the House of Lords decision in *Burmah Oil v Lord Advocate* (1969) AC 75 was averted by the enactment of the War Damage Act of the same year.⁷

Commenting on *coups d' etat*, revolutions and counter revolutions, which became the most popular and accepted forms of changing governments, especially in the countries of Africa, Latin America and Asia, Justice A. Akintola Aguda wrote:

"In these dangerous games of revolutions and counter-revolutions, the Judiciary has had on many occasions, the unenviable duty of upholding repressive and barbaric laws on the pain of dismissal or in some cases even of liquidation. The fact of course is that most governments founded upon the wielding of the gun, or upon palpable illegality... can hardly be expected to have much regard for legality and the rule of law... most principles or legality and the rule of law are rough-shod ridden as if they do not exist or as if they are obstacles to be crushed; in these circumstances, the judiciary being the watch dog of these principles could not hope for much hearing, not to talk of affection."⁸

We are in position to examine reasons for the continuing misunderstanding by other state organs of the functions and importance of the Judiciary.

1.1 CUSTOMARY AND COLONIAL BACKGROUND

Africa is the mother of all cultures, all the way from the Cape of Good Hope to Cairo, across from Mombasa to Dacca. In strict scientific and legal terms, this is a truism, for the acceptance of Africa as the Birth Place and Cradle of "*Homosapiens*" is a clear acknowledgement of this fact. There has been a general agreement for sometime now amongst scholars that Africa was the centre of the Stone and Iron Ages of the world.⁹ The origins of African civilizations are to be studied and appreciated against a background, which Africanist **Basil Davidson** has described in this manner:

"The formative problems and solutions found by small groups faced with the destiny of peopling one of the world's largest and physically most testing land masses. It is here that one may light upon crucial keys and questions of mood and temper or trace the sources of attitudes which have stubbornly combined a firm respect for precedent with a restless onward shifting readiness for experiment, which has instilled a capacity, greater perhaps than that of any other major civilization ... The essence of the African belief has rested in

7 The issue was whether the crown was liable to pay compensation for damage done to private property in the defence of the realm. The courts said yes, the government said no. parliament obliged by passing the war damage Act which granted immunity to the crown for war damage.

8 In *Essays Third World*, etc. op.cit.(n-8) from 137.

9 The search for Africa, A History in the making, James Curry. London, page 20.

9

***The Theory and Principles of Constitutionalism and the Rule of Law:
Separation of Powers***

the notion of 'vital force. Perhaps it is in this that one may glimpse an old attempt at conceptualizing the challenges of life and survival in a Continent of such natural hostility to man.'"¹⁰

Civilization and culture presuppose the existence and survival of human societies. Their survival in Africa has been self-evident since time immemorial. Indeed it is only in recent times after Africa began to absorb elements from foreign cultures and practices that the extinction of that continent's community became a distinct possibility. In any event, the discovery of a human community implies with it, *ipso facto*, the presence of certain attributes such as civilization, culture, law, standards, values and their assessment. Hence, it has always been an insulting and baffling mystery to African scholars and readers to find writings by some foreign commentators suggesting that until its ravages and humiliation by colonialists, Africa was devoid of culture and civilization and that its laws and values, were either nonexistent or primitive. Happily, these are prejudices, which modern enlightened and knowledgeable writers have effectively exploded. This is one of the reasons why African scholars and researchers as well as writers need to enter into this area of controversy and bigotry and endeavor to correct the wrongs committed therein by others.

Socio-legal writers distinguish between three kinds of norms, namely, those which are social, legal and political all of which are enforceable through informal and formal means. In relation to legal norms, there may be formal institutions to enforce them. For instance, it has been observed in regard to Europe, that human societies there would not be able to survive and manage without a legal and omnipotent sovereign whose commands are enforceable, with, if need be, coercion.¹¹

It is also true that in Africa, there were some states and communities, which possessed political and legal institutions for the subjugation of their respective populations. However in the majority of other states of Africa, powers of decision, adjudication and enforcement were diffused and exercised by diverse personages within the hierarchy of society and buttressed by the vital force, which customarily sustained the balance and equilibrium in society.

History shows that the enforceability of African laws and customs depended on two major operational premises, namely, reliance upon the parties in dispute to accept, without further argument, the final judgment of the people and the fear of

¹⁰ See History of East Africa page 527.

¹¹ S.A. de Smith, *Constitutional Law and Administrative Law, Foundations of Law*, (4 ed). pages 73-74.

upsetting the balance of nature or of the community, which is the vital force. The disregard of either principle was believed to lead to the punishment and destruction of the community as a whole.

While the African traditional legal systems recognized the place and value of the individual, that recognition was invariably linked with the survival and sustenance of the family and of the community of which the individual is a mere component. The interests of the family and of the communities are paramount in the quest for survival.¹² This was a political and legal concept taught and memorized for all times by the Africans. Each individual and his or her family owe a duty to each other and to the community at large. In exchange, the individual enjoys certain rights and is protected and sustained by the respective public and private power units within his or her community.

The superiority of family and communal rights over those of the individual was so respected under African customary law that any individual adjudged guilty and given a punishment by the relevant authority in the community, would be dealt with by his or her own members of the family or community without having to rely on or wait for external forces to enforce or execute the judgments.¹³

Besides prescribed compensation and fines which were expressible in tangible goods or recognized services for crimes committed, the traditional legal and traditional systems developed and nurtured various fictional and real devices which were effective as punishments and means of correction. These included the powers of magic, the curse, taboo, banishment and the rituals of sacrifices for appeasement and cleansing. In inception and development, these devices were intended to supplement the enforcement mechanisms of the law. They thus came to be considered and revered with awe and were unquestionably obeyed by those to whom they applied. In fact, over the centuries, these traditional and fictional sanctions in Africa proved more effective in securing obedience of the law than the modern ideas of execution, hanging, imprisonment and fines. Moreover, traditional sanctions are cheaper to impose than modern legal remedies and punishments. Society does not need to build or maintain a jailhouse when the culprit is banished and out cast from the community. The village does not have to hire the services of a policeman when all potential thieves are frightened of being killed by the thunderbolt. Mothers need not mind their children in fear of kidnap and

12 See Eugene Kamenka and Alice E. soon Tay . Eds Social Traditiond, legal Traditions in Law and Social control (1980) 3-26.

13 Africa, Eds. Phyllis M. Martin and Patrick O' Meara, (3 ed). page 333.

The Theory and Principles of Constitutionalism and the Rule of Law: 11
Separation of Powers

defilement when potential child molesters know and fear that they will “surely” die of leprosy caused by the curse for child abuse.¹⁴

There were of course weaknesses in these African laws and customs. The laws relating to methods of identifying wrong doers which were followed by instant treatment of the culprit by beating or even killing without trial was unjust and occasionally led to wrong persons being punished or killed for wrongs they did not commit. Under some traditional laws, identification by the ordeal and magic of suspects for purposes of punishment and compensation was, unscientific and often iniquitous. Many of these have been abolished while the rest have been reformed in modern African states.¹⁵

There were areas in which the African traditional laws can be said to have been better than those found in other legal systems. It's emphasis on compensation and reconciliation and in emphasizing settlements of disputes amongst the immediate parties and their families, encouraged, unity and cohesion of the community. Its preference for compromise, arbitration and compensation as opposed to punishment and deprivation of property in the name of the impersonal state, which are the characteristics of the modern regime of criminal administration, enhanced people's belief in and respect for the law.

One of the major criticisms some foreign writers had against African customary law is that it lacked administrative infrastructure, institutions and machinery for adjudication and enforcement of its rules. It is said that there were no customary court buildings, armed police or publicly appointed executioners. Consequently, the conclusion is reached that African law is not proper law and at worst, it does not exist beyond habits and conventions.¹⁶ Thus, Evans-Pritchard, writing about the customary law of the Nuer of the Sudan said:

“In a strict sense Nuer have no law. There are conventional compensations for damage, adultery, loss of limb, and so forth, but there is no authority with power to adjudicate on such matters or to enforce a verdict.”¹⁷

In his favour, Evans Pritchard confined his limited knowledge of the African customary law to the Nuer. There have been worse writers on the subject with misconceptions and stories as tall as those of Lockness Monster. Thus the editors of the book entitled “*Major Legal Systems of the World*,” asserted:

“While this distinction can be drawn in respect of African customs by European jurists, it is for the African difficult to understand in a country (*sic*) where there is neither any legal

14 See *Attorney General v Abuki*, Constitutional Appeal number 1 of 1998 (SC of Uganda) (UR).

15 e.g Uganda Const, Article 33(6).

16 *Major Legal Systems of the world*, 1978.

17 Cited in *Human Rights and African Customary Law* (T.W.Bennet, Ujuta and Co. Ltd, 1995).

12 *Kanyeihamba's Commentaries on Law, Politics and Governance*

science nor jurists. In the same way, the distinction between public and private law, civil and criminal law, law and equity, are, *a fortiori*, unknown".¹⁸

Incredibly, this book was published as late as 1978. This kind of unresearched and wild generalization is unacceptable and unforgivable when presented by people masquerading as objective scholars. Most of the scribblers in this category have been scathingly castigated by enlightened writers on African custom such as Roberts, Anthony Allot, Basil Davidson, Patrick Mc Auslan, William Twining and Lloyd A. Fallers, to mention but a few whose respective writings are fairly familiar.¹⁹

Earlier on, I mentioned punishment by the curse. It is gratifying to know that most of the writers of the first category who belittled or ignored African customs and their writings have either perished or been overshadowed by the writings of the more enlightened, thanks to the force of the curse.

The sustenance of the African society partly depended on the absence of serious criminal activities, which tend to disrupt society, and partly on two other essential necessities, namely, the family and land. Inevitably, it is for these three subjects, criminal law, the family and the land, that African customary law developed the most effective and complex codes of rules and values. In fact, a study and knowledge of customary law relating to land and the family virtually give the whole understanding of the main principles and workings of African customary law. Beyond these two subjects, the law developed little else that was complicated or detailed.

Thus, Schuller wrote:

"It is generally recognized that indigenous systems of law in Africa are deficient in the areas of commerce, finance and welfare: further, indigenous law is considered inadequate in the field of obligations."²⁰

For this reason, African governments which are committed to modernity and development have had to borrow laws or enact new ones in order to modify indigenous laws and cater for the *lacuna* discovered in African customary law so as to meet the needs of today's economies and development.

The non-recognition of some of the finer points of African customary law was based partly on ignorance and partly on the incidents of imperialism and colonialism. Taking these issues in turn, it can be said first, that notwithstanding the variety and richness of African customs, some foreign scholars who may have studied one or two African communities generalized and thought that Africa was the same all over and therefore whatever they had discovered and understood in

18 *Ibid.*

19 These author's works are discussed in G.W. Kanyeihamba, *Urban Planning and Development in East Africa*, Ph.D Thesis, Warwick, 1974.

20 African Customary Law, Mimeo, Makerere University Library Arch. 1961.

The Theory and Principles of Constitutionalism and the Rule of Law: 13
Separation of Powers

the country or countries of their study obtained elsewhere in Africa. We know that they were in error to think as they did.²¹

Secondly, writers and scholars who were mainly Europeans used their own systems as universal scales of measuring culture, laws, customs, rules and values everywhere and, when they found few or no similarities with their own, they declared the ones outside Europe or their own country's systems and rules to be deficient or inferior.²²

However, the main reason for denying African customary law its place in the world and value was colonialism. The policy of colonial rule was based on the theory of the superiority of the imperial race and its culture and laws over the subjugated peoples and their own culture and laws. The myth of a superior culture was a necessary instrument in keeping a small minority, the colonial rulers, in complete domination of a large majority, the indigenous population. If the latter were to be allowed to believe in their own culture and values and deem them to be equal with those of their masters, they could challenge the right of the imperialists to govern them. They would demand the right to participate in decision-making processes of governance of the country. They might have demanded, as they eventually did, equal representation in the offices of government. There prevailed at the time in Europe a paternalistic attitude towards all non-European peoples of the world to the effect that the latter were too backward to be credited with any contribution towards the advancement or achievements of mankind.²³

In foreign lands where European explorers and travelers discovered ancient civilizations rivalling and in some respects, superior to their own, the tendency of these explorers and travellers was to publicize and highlight mannerisms and behaviour in those countries which were considered primitive or undesirable, in comparison to those known to their readers and listeners in Europe. This paternalism was sometimes buttressed by prejudices against non-Europeans.

1. Independence of the Judiciary
2. Democracy

21 See Max Gluckman: judicial Process Among the Barotse in Dennis Llod's Jurisprudence, (1955) page 230.

22 See Kanyeihamba G.W. ''Constitutional law and Government in Uganda, E.A.L.B. 1975 at page 16.

23 Kanyeihamba G.W. *Constitutional law and Government in Uganda*, op. cit. page 17.

CHAPTER TWO

THE MAKING AND NATURE OF THE 1995 UGANDA CONSTITUTION

The Uganda Constitution has evolved from discussions, research and deliberations which attracted the participation of an unprecedented number of citizens.¹ Whatever its weaknesses, and there are some, it can be said that the Uganda Constitution is an instrument whose nature and content have been determined through the consensus of the Uganda people as a whole.² The membership of the Constituent Assembly which debated and promulgated the Constitution was as widely representative as it could possibly have been under the circumstances. Of the 280 odd delegates who participated in the Constitutional making exercise itself and of the witnesses who gave ideas and wrote memoranda for the Constitutional Commission which preceded the Constituent Assembly, the overwhelming number of them were ordinary Ugandans or their duly elected representatives. Examination of the written records about the exercise of constitutional making shows that the government cadres and their appointees apparently played an insignificant role in this national exercise of making a new Constitution for Uganda. Proposals which were perceived by the delegates as originating from some government sources were viewed with the greatest of suspicions and were often rejected. It is true to say however that the overwhelming number of delegates identified themselves with the ruling National Resistance Movement. Consequently, through caucuses and meetings with the top leadership of the movement, the principles and ideas which emanated from them largely found their way into the Constitution.³

It is also true to say that on a number of issues such as federalism, the right of political parties and organisations to operate freely at all times and on land, there were significant minority opinions which were not fully accommodated within the

1 Constituent Assembly (Representation) Act.

2 In addition, there were representatives (10) nominated by the President and special interest representatives elected by the women, the Army, the Workers, the Disabled and the Workers.

3 The delegates who claimed to represent interests other than those of the NRM numbered between 50 and 60 in number.

four corners of the Constitution.⁴ However, all said and done, the 1995 Uganda Constitution can be said to be a people's Constitution.

The very first article of the Constitution, Article 1 (1), provides that all power belongs to the people who shall exercise their sovereignty in accordance with the Constitution. Other clauses of the same article provide that all power and authority of government and its organs derive from the Constitution which in turn derives its authority from the people who consent to be governed by expressing their will and consent through regular, free and fair elections or their representatives or through referenda.⁵

Thus, the most important weapons for the defence of the people's liberties as enshrined in the Uganda Constitution and the guidelines of the same Constitution are not the government of the day or the Uganda Peoples Defence Forces or indeed the police, but the ordinary voters casting their votes for the free choice of the political systems and leaders to govern them and doing so regularly and wisely. It is by electing correctly the right and principled leaders that the Uganda Constitution shall be protected.⁶

The provisions of the Uganda Constitution theoretically reduced the powers of the Executive in the office of the President and increased those of Parliament which consists of the elected representatives of the people.⁷ While it is provided that like members of Parliament, the President shall be directly elected, it is also provided that, what the President of Uganda does or proposes to do by way of public policy or appointment shall be subjected to Parliamentary debate and approval. Most of the President's policies, decisions and appointments shall be submitted to Parliament for debate and approval.⁸ The theoretical President's influence on Parliament is almost negligible. He or she may delay Parliamentary Bills for sometime, but at the end of the day, a resolute Parliament can and will override the Presidential veto. Parliament can impeach and convict a President who is accused of violating the Constitution or the oath of office and have him or her removed from office. The President's proposals and nominees for public offices can be rejected by Parliament. On the other hand, the President has no power to prorogue or dissolve Parliament. Every Parliament is constitutionally guaranteed its

4 e.g the Baganda caucus of delegates desired federalism to be provided for in the Constitution as did those who claimed to belong to Minority ethnic groups.

5 Article 1(3).

6 Mugaju: *An Historical Background to Uganda's Non-Party Democracy in No-Party in Democracy in Uganda, Myths and Realities*, Fountain Publishers, 2000, page 8.

7 Provisions of Chapters 6 and 7, respectively.

8 Article 99.

five years mandate to the last day without interruption by the Executive.⁹ Indeed, even in times of war and emergencies, Parliament would be letting down the nation if it did not effectively perform its functions as it would have itself to blame and electors would find it hard to forgive such a Parliament. However, all that amounts to nothing more than constitutional theories. In practice and since 1995, the Executive arm of government through its powers of persuasion and the purse has systematically and effectively dismantled the actual powers of Parliament and more or less dictated how those powers will be exercised.¹⁰

As of today, the Executive will in Uganda easily overrides any murmurings to the contrary that may be expressed in Parliament. The reasons why the reverse of what was intended in the Constitution has become the norm can be easily discerned.

Notwithstanding the promise it had made during the bush that there would be an elected Constituent Assembly to enact a new constitution for Uganda, the NRM in government initially recoiled from the idea by enacting Legal Notice No. 1 of 1986 (Amendment) Statute of 1989 in which it was provided that the new constitution would be enacted and promulgated jointly by the then two existing organs of the NRM, namely, the Interim Legislature known by the name the National Resistance Council known as the NRC and the National Resistance Army Council, its military wing popularly known as the NRA.¹¹

However, by the time the National Resistance Council came to enact the enabling legislation under which the new constitution would be debated, enacted and promulgated, the mood for a different kind of body to enact the new constitution had radically and dramatically changed. There was now a chorus of powerful voices joined in by political parties, officers of the NRA and opinion leaders in the country that only an assembly freely elected by the people could enact, promulgate and legitimise a new constitution.

Wisely, both the President, Yoweri Kaguta Museveni and senior ministers in Cabinet as well as the majority in the National Resistance Council jumped onto the bandwagon of an Elected Assembly. Cecilia Ogwal, then Assistant Secretary General of the Uganda Peoples' Congress (UPC) had asserted firmly:

"The Uganda People's Congress (UPC) does not recognise or accept that the NRC and the NRA are the legitimate and impartial organs to deliberate, adopt and promulgate a

9 Article 77(3).

10 See Ngozi Beatrice: *The State of Constitutionalism in Uganda*, 2003 in *Constitutionalism in East Africa*, op. cit. from page 30.

11 Legal Notice number 1 of 1986 (Amendment 2).

18 *Kanyeihamba's Commentaries on Law, Politics and Governance*

National Constitution for the people of Uganda. The UPC shall only recognise and accept a Constitution deliberated upon, adopted and promulgated by a Constituent Assembly:

1. Composed of representatives who have been freely elected from all parts of Uganda,
2. Whose election will be in accordance with universally accepted principles of universal adult suffrage and whose election all political parties will have participated in.”¹²

The people's popular demand for an elected Constituent Assembly was eventually accepted by the NRC which in 1993 enacted the Constituent Assembly Act. However, the composition and purpose of the Assembly were criticised and regarded by many non-movement Ugandans as ill-intentioned. Thus one commentator said:

“But there was a sting in the tail. Under the Act provision was made for a fully-fledged Constituent Assembly but its composition was to be a mixture of directly and indirectly elected delegates as well as presidential nominees. Moreover, the directly elected delegates' elections were run on non-party political lines, each candidate being elected on his or her individual merit and, on non-partisan grounds such as political, tribal or religious affiliation. Nor were candidates free to conduct their own election campaigns. On the contrary, the returning officer for each electoral area had the power to prepare and conduct one candidates' meeting within each parish in his or her area of jurisdiction, and on the appointed day, time and place, all Constituent Assembly aspirants had to attend and address the public under his or her supervision.”¹³

The Constituent Assembly was viewed by many opponents of the NRM as the vehicles for sustaining the NRM in power for an indefinite period. Although some constitutional law experts had argued that if the CA were to debate and enact a viable and objective constitution, it was important that the delegates elected to do so should be disqualified by law from standing as candidates for the Parliament to be elected immediately following the promulgation of the new constitution, the idea was overwhelmingly rejected by both the NRC which enacted the CA Act of 1993 and by the Constituent Assembly itself when it first met and engaged in a general debate.¹⁴ Consequently, the C.A electoral process was seen by many participants as a try run for the impending Parliamentary elections and the original purpose of the CA was submerged with the present and future personal and political interests of most delegates. After the CA elections, its work was similarly hampered by the same considerations. It has thus been said:

12 In a letter dated 5 June 1991 and addressed to the Minister of Constitutional Affairs, Kampala.

13 Furley, O. Democratization in Uganda, op.cit. *ibid.*, also see New Vision 14 June 1994.

14 See: Proceedings of the Constituent Assembly.

“The CA became a highly political forum, in which the main issue became how the various forces involved in the struggle for power could position themselves for the ultimate prize of political power.”¹⁵ It is also thus that Nelson Kasfir Observed:

The Constituent Assembly elections could lay claim on being the most free and fair of Ugandans through nationwide elections since independence. But the elections also posed a challenge by adding a transitional stage in the struggle for power and the return to democracy. At stake are the questions whether the NRM will be the dominant political force in the years to come ...¹⁶

Be that as it may, the Constituent Assembly commenced its business in earnest. The debating quality of the majority of delegates was high. The Assembly prepared and adopted its own rules of procedure. Decisions of the Assembly were to be ascertained by the Chairman by way of *Consensus* but divisions on contentious issues were permitted. The CA established a number of Standing Committees through which its work was facilitated. The most important of these committees were the Business Committee which made recommendations for the day to day running and agenda of the Assembly and the Legal And Drafting committee which advised the Assembly on legal and contentious issues, dealt with the content and text of the Constitution, advised on the wording of the text and synchronised all the proposed constitutional amendments. The debates on the Constitution progressed through several stages. The first was the general debate. Then there were recesses in which delegates were issued with several documents to read and prepare themselves to debate the Constitution, Chapter by Chapter and clause by clause. It was observed that:

“The general debate was intended to heal the wounds of the past, minimize mistrust, build confidence between delegates and lay the foundation for reconciliation, mutual respect and consensus.”¹⁷

The second step was the consideration stage when the subject committees which had been established by the Assembly itself to expedite its work, completed their tasks and reported their recommendations to the plenary session of the Assembly for adoption and modifications or remittances, if any. There followed the report stage when a completed subject or Chapter was considered and finally adopted by the Constituent Assembly. After all the Chapters had been adopted, the Legal And Drafting Committee carried out the work of synchronising, coordinating and finalising the final text of the Constitution and on adoption of that committee's

15 See: Mugaju Justus and Oloka-Onyango, J: “No Party Democracy in Uganda,” op.cit

16 Movement Democracy, Legitimacy and Power in Uganda, in No Party Democracy in Uganda: op.cit. page 60.

17 Katalikawe, James: The Making of the 1995 Constitution op.cit. page 7.

report, the 1995 Constitution was enacted and promulgated on 8th October 1995 as the Constitution of the Republic of Uganda.¹⁸

During the duration of the CA debates which lasted for some sixteen months, several *caucuses* were formed to organise support or oppose certain positions in the Assembly. The main ones were the National *Caucus* for Democracy, the NRM *caucus*, the Buganda *caucus* and the Women *Caucus*. Later, minor ones such as the minority *caucus*, the NRA *caucus* and the Northern Region *caucus* emerged and worked informally. The result of this was that, instead of examining and considering the Draft Constitution dispassionately, the Constituent Assembly got polarized along sharply divided political lines. Rational and sensible motions originating from groups which the NRM *Caucus* perceived as opposition groups were often rejected in favour of what that *caucus* considered to be its own or its supporters', however divisive or inferior that latter might be.¹⁹ For instance, the Multipartists' practical convenient and inexpensive motion presented by Honourable Dick Nyai that Presidential and Parliamentary elections be held on the same day was rejected without second thoughts after some influential movementists, both in the CA and outside it, had held a private *caucus* meeting and spoke against the motion for political expediency and advantages. The definition and constitutionalisation of the Movement as a political system of governance was *caused* wholesale amid the drowning of moderate and rational voices amongst the Movement itself. The curtailment of the rights of association and assembly and the holding of referenda upon the same when Chapter 4 of the Constitution had already been adopted by the CA guaranteeing the same rights was politically motivated and highly contentious.²⁰

The failure by the NRM diehards both within and outside the Constituent Assembly, to agree and compromise with other political forces undermined the force and legitimacy of the Constitution. The inflexible attitude exhibited by the same leaders negated the envisaged NRM fundamental need for national consensus on the constitutional arrangements which were expected to stand the test of time. An anticipated truly representative Constituent Assembly was turned into a rigid movement caucus that reduced what should have been a revered national treasure to be defended at all times, into a partisan instrument with contradictions and

18 The enactment of the Constitution was completed on 23 September 1995 see: the Preamble to the Constitution at page 1.

19 Barya, B.J.J Popular Democracy and the Legitimacy of the Constitution. Some Reflections on Uganda's Constitutional Making Process, CBR Working paper number 38 Kampala, 1993.

20 See: proceedings of the Constituent Assembly, op.cit.

which would later be rendered less sanctified by the same caucus through political arrogance and misconceptions.²¹

2.1 THE SALIENT FEATURES OF THE 1995 CONSTITUTION

At the beginning of its deliberations, the Constituent Assembly divided the provisions of the Odoki Commission's draft constitution into contentious and non-contentious matters and these were debated and resolved, if at all, differently by the Constituent Assembly.

In general terms, the debates and adoption of non-controversial provisions of the Constitution produced the best results and always either with unanimity or large majorities of delegates in support. The most controversial sections of the draft Constitution generated acrimonious debates and took longer to resolve. The debates were often punctuated by recesses, consultations in the constituencies and walk-outs by the dissents.²² However, it is to be remembered that on the whole, the Constitution reflects the views of the majority of the CA delegates who represented the greater part of the country's electorate. The NRM caucus and its supporters in the CA which supported all the provisions of the Constitution including the most controversial ones, had more than two thirds of all the delegates in the Assembly. However, this is not a reason for complacency for even the tiniest of minorities whose views are constantly ignored or whose rights are violated can organise individually and collectively and cause chaos in the nation and, in some cases, may uproot from power those who have denied them the right to share in the governance of their country.²³

The most important principle enshrined in the 1995 Constitution is that the Constitution vests all power in the hands of the people who must be governed by their consent, through organs created by the Constitution itself and whose personnel are elected or appointed in conformity with the rules and procedures laid down in the Constitution or other properly promulgated or enacted Constitutional instruments and laws. The President and the Executive are subordinate to and are subjected to the will of Parliament which is the representative body of the people in whom political sovereignty of Uganda resides.²⁴

The Constitution, which is the supreme law of Uganda, commences with an important Preamble and a set of National Objectives and Directive Principles of

21 *Infra.*

22 See Proceedings of the Constituent Assembly, *op.cit.*

23 *Infra.*

24 On the Recommendation of the Legal and Drafting Committee of the Assembly. See C.A Proceedings.

State Policy. The Constitution is an ambulatory living instrument for the good governance, liberties, welfare and protection of all persons in Uganda. The makers of the Uganda Constitution did in the name of all Ugandans, recall the country's history which had been characterised by political and constitutional instability. They took into consideration the struggles of the Uganda people against the forces of tyranny, oppression and exploitation.²⁵ They then committed themselves to build a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. The framers of this same Constitution proceeded to adopt, enact and give themselves and their posterity, the Constitution of Uganda. They declared that the National Objectives and Principles of State Policy enshrined in the Constitution were intended to and shall guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society.²⁶

One of the most important Chapters in the Constitution is Chapter four, which contains rigidly entrenched provisions for the recognition, protection and promotion of fundamental and other human rights and freedoms. These rights and freedoms are to be respected, upheld and promoted by all organs and agencies of government and all persons. Under Article 21 of the Constitution, Parliament is empowered to enact laws, which are necessary and demonstrably justified in a free and democratic society. Drastically, under Article 46, It is provided that during a period of emergency, an Act of Parliament shall not be taken to contravene the provisions contained in Chapter Four of the Constitution if it authorizes measures that are reasonably justifiable for dealing with a state of emergency except that such an Act may not derogate from the absolute human rights and freedoms protected in the Constitution. These rights are the right to a fair hearing, freedom from torture cruel and inhuman or degrading treatment or punishment, freedom from slavery or servitude and the right to an order of *Habeas Corpus*.²⁷

Chapter four of the Constitution, has been hailed by experts and commentators as one of the finest and best structured Bills of Rights adopted by any state.²⁸ The Articles and clauses in Chapter four are worded either in the same way or draw inspiration from international law principles law and practices. Although the

25 Preamble.

26 In Preamble.

27 Article 44.

28 Preamble.

Constitution attempts to enumerate and incorporate every known right enshrined in the United Nations Universal Declaration of Human Rights and subsequent Protocols and Treaties as well as from foreign comparative constitutions studied by its framers, the Constitution recognises that the list of present and future rights is inexhaustible by providing that:

“The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.”²⁹

For enforcement purposes, Article 50 of the Constitution is fundamental. It provides that any person who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened, is entitled to apply to a competent court for a declaration to that effect and for a redress which may include compensation. Moreover, any person or organisation may bring an action against the violation of another person's or group's human right. Any person aggrieved by a decision of a court trying the action has free access to an appellate court or tribunal. The justiciable provisions of the Constitution are derived directly from international law and practices. Thus, it is provided that women shall be accorded full and legal dignity of the person with men. Under Article 33(6) of the Constitution, laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine women's status are prohibited by the Constitution.³⁰

Children shall have the right to know and be cared for by their parents or those entitled by the law to bring them up and shall be the responsibility of the State and the parents of the child. The law shall accord special protection to orphans and other vulnerable children. Moreover, any child of not more than five years of age found in Uganda and whose parents are unknown shall be presumed to be a citizen of Uganda by birth. Article 12(2) (b) allows a person who has lived in Uganda continuously for a period of up to twenty years to be automatically registered as a citizen on application, a provision which was intended to benefit refugees as well. Every person in Uganda has a right to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in communion with others. Minorities have a right to participate in decision making process and their views and interests shall be taken into account in the making of national plans and programmes. We have emphasised respect for and protection of human rights in the full realisation that it is the disregard, abuses and violations of human rights which lead or force people, who have been lucky

29 Article 45.

30 Article 33 of the Constitution.

not to be killed or detained to flee from their countries of origin and become refugees elsewhere. For decades, Ugandans have experienced worst abuses and violations of human rights observed and respected in other countries of the world.

Finally, in its efforts to widen the democratic principles of participation in government and democracy, the NRM not only accorded equal rights to men and women, the youth, the workers, the disabled and soldiers but made sure that their representation in public bodies is constitutionally entrenched. The most notable achievement of the NRM government in this area was the establishment of the principle of affirmative action for women and other disadvantaged groups so that their status and opportunities can be brought to the level of that of men or ordinary people.³¹ This guarantee is underwritten by the Constitution. It established and organised political resistance councils which were initially supposed to be non-political, from the village to the national level, with the Resistance Council Courts system running through the infrastructure up to the government institutions to assist disadvantaged communities and people, such as the Ministry of Women's Affairs, Ministry of Youth, Culture and Sports, the Karamoja Development Agency, the Teso Rehabilitation Reconstruction Commission and the Uganda Northern Region Reconstruction Ministry.³²

The NRM recognised the principle that democracy needs to be buttressed by the protection of human rights, the supervision of the people and public agencies likely to threaten or abuse them and the disciplining and punishment of those who actually violate them. In this regard, it created first, the Commission of Inquiry into past violations of human rights in Uganda, which recommended the establishment of a permanent Commission of Human Rights which was later established by the 1995 Constitution. It established the office of the Inspector General of Government (IGG) and a Board of Directors for the regulation and protection of Non-governmental Organisations such as the Foundation for Human Rights Initiative, FIDA and ACFODE. The NGOs are encouraged or allowed to organise and participate in both national and international conferences, seminars and study courses, covering a diversity of subjects. An independent judiciary and a free press support all these activities. The NRM devolved power to the people at the grassroots level by a process of decentralisation of decision-making and developmental policy issues from central government control to the jurisdiction of the local governments. Admittedly, the RCs now the LCs have not performed as well as had been expected. In some cases, individual local leaders or several of them

31 Article 33.

32 The Commissions give periodic reports of their work to Parliament and the line Ministries.

have abused or usurped the council's powers and indulged in excesses to the detriment of many residents.³³

Questions and doubts remain as to whether all the functions and tasks devolved to local councils at different levels were properly assigned. Such functions and tasks have included land use and economic planning and the exercise of judicial powers. There is ample evidence that for some of these functions and tasks, local government councils have been ill equipped and deficient in manpower and other resources to be able to perform them adequately. Records show that the exercise of judicial powers by some of the local councils and councillors and officials have been inadequate, illegal and in some instances, corrupt.³⁴ Despite mechanisms in the local government for supervision and accountability, this is not always possible either for lack of the necessary and qualified personnel, resources and indifference on the part of the government or those entrusted with these responsibilities. Consequently, it is imperative that certain aspects of local government have to be reviewed. Such review may include the reconsideration of the federal demands of the Uganda traditionalists and the transfer and adjustment of some functions and tasks from one level of government to another.³⁵

Nonetheless, the system of local government and how it ought to operate in society, as originally conceived by the National Resistance Movement encourages grassroot democracy and governance by consent and participation. It has been the subject of study and favourable comments by expert analysts, scholars and observers, both within and outside Uganda, and is regarded as a popular concept that constitutes a fundamental change and permanent feature of governance in Uganda

Perhaps the greatest innovation introduced and practised by the National Resistance government in Uganda has been the recognition and full acceptance of women as equal partners and full participants in the social, political and economic affairs of the country. In politics and government, women's participation and positions from the lowest to the highest offices of state are prescribed and guaranteed by the provisions of the Constitution and laws of Uganda.³⁶ Moreover, throughout the years in which Uganda has recognised and accepted the role of

33 Burkley, I. "People's Power in Theory and Practice." *The Resistance Council System in Uganda*, Yale University, 1991.

34 IGG Reports.

35 In 2001, Government set up a Constitution Review Commission for this purpose. The Commission's report was later published with additional proposals by the Government including the lifting of the term limit on the Presidency which were not nationally debated or approved.

36 The Constitution provides that the number in those elected offices should not be less than 1/3.

women, women's performance has amply justified the belief in their unconditional equality with their male compatriots. This has shown quite decisively how correct and desirable the policy of recognising and accepting women as equal partners in society has been. It has given rewards to the NRM in that empirical studies and findings show that the greatest number of women in Uganda in every part of the country tend to support the NRM in local and national elections.³⁷

For most of the years in the period between 1986-1995, much of Uganda was at peace. For the majority of Ugandans, the coming of the NRM removed both political and personal fear. In this same period, state inspired persecution, tortures and murders which had been common occurrences in the times of previous regimes, were not only strictly prohibited but state officers and army personnel who occasionally committed any of them were sought out, tried and if convicted, severely punished.³⁸ The peace and observance of human rights in this period were vigorously monitored and policed by fearless cadres of the NGOs and the National Press. The latter remained, to a great degree, free and independent and even when some journalists indulged in inaccurate reporting they were largely left alone, unprosecuted.

The independence of the judiciary was strengthened. More judicial officers were appointed and relatively well remunerated and court buildings and equipment were given priority in the national budget and foreign aid preferences.³⁹ The police and the army now called the UPDF were subordinated to civil authorities, strengthened and facilitated.⁴⁰

Another important milestone in the quest for unity and reconciliation in the country by the NRM was the restoration of traditional and cultural leaders in Buganda, Toro, Bunyoro and Busoga and several other Districts which wished to revive or create such cultural leaderships.⁴¹ The district of Ankole which had previously been ruled by a monarch eluded a solution throughout this period partly because the majority of the population in that region did not wish to see monarchy restored and partly because of the utterances and pre-emptive decisions and acts which Prince John Barigye, the heir apparent, allowed himself to be associated with, such as the crowning and naming him the King of Ankole before the

37 Parliamentary and Presidential elections of both the 1996 and 2001 results analysis.

38 Odonga Ori Amanza: Museveni's Long March, op.cit. Appendix three from page 246.

39 Chapter 8 of the Constitution contains elaborate provisions on the independence of the Judiciary.

40 Article 208(2).

41 Article 246.

Banyankole and the NRM government had opportunity to consider and resolve the issue of the traditional and cultural leader for that region.

Nonetheless, the restoration of traditional and cultural leaders in the rest of the country and the return of cultural treasures and regalia even in Ankole cemented calmness and peace in the areas benefitting. Throughout the whole country, the NRM's policy of encouraging the revival and practices of popular traditions and cultures including music and dances while discouraging those which degrade women, became popular and a catalyst for peace, stability and tranquillity in the country.⁴² One of the great ideas to be implemented by the NRM since 1986, is the incorrectly named Universal Primary Education (UPE) under which thousands of Ugandans have benefited by getting free primary education. The policy has meant that the rate of literacy in Uganda has increased rapidly and favourably. However, only a limited number of children from each family are chosen to benefit from this free education. The policy underscored President Yoweri Museveni's remarks when he said;

"Fellow Ugandans, I need to remind you that a modern country needs to cope with the following major challenges: employment, widening the tax base, developing the human resource through education for all and the improved health care, improving infrastructure and supplying of enough goods and services."⁴³

This is one of the statements welcomed by most Ugandans because in the areas listed by the President, his government has had spectacular successes in education and all Ugandans including the NRM severest critics have both welcomed and benefited in this field. Occasionally, however, the NRM indulges in contradictions. While encouraging and financing universal primary education, partly financing and assisting the establishment and running of higher institutions of learning including universities, the NRM leadership has persistently opposed the setting up of minimum education standards for elective posts including those of Parliamentary candidates. This is because the majority of voters in the country are either illiterate or possess very low educational qualifications and in order to please them and covet their votes, many political leaders shy away from rewarding those who have struggled to be educated. In any event, a nation can only develop and prosper if most of its leaders both at the national and local levels are enlightened through education and reading and certainly when they are highly educated and trained.

42 Ministry of Women Affairs, later renamed Gender, Labour and Social Development was specially created.

43 See: The Monitor Newspaper 12 March 2002.

The tolerance and acceptance of mediocrity in our elections have meant a temptation on the part of those who do not qualify under the very barest minimum standards, to cheat and forge educational certificates and diplomas.⁴⁴ However, as President Museveni himself admitted, employment, especially of the youth, and the widening of the tax base are still unresolved. With regard to the latter, government efforts are often frustrated by the endemic corruption and graft within the Revenue Authority's offices and officers with little effort on the part of those responsible to discipline the culprits and curb the scourge.⁴⁵

However, by far, the greatest legacy the NRM has bestowed on Uganda remains the Constitution of 1995.⁴⁶ The Constitution has been hailed by many experts as one of the best in the world.⁴⁷ The Constitutional provisions guaranteeing human rights, equality and participatory democracy for all citizens, the organs and institutions of government and their relationships with one another are all reckoned to be some of the best drafted notwithstanding the turbulences experienced in the history of Uganda.⁴⁸

The 1995 Constitution worked perfectly well until after the 2001 elections when the top leadership decided that they wished to perpetuate themselves in power. Well calculated and sometimes secret moves began to surface in the quest for the prolongation in office of the NRM administration. Article 105 (2) of the Constitution was seen by the same leadership as an obstacle to their desires. This is the provision that prohibited any one individual Ugandan to be elected for more than two terms of office as President. A campaign was started by the leadership of the NRM to remove what they perceived to be a Constitutional obstacle. During the debates that ensued, one Cabinet Minister was heard to state that nothing constitutional or otherwise could stand in the way of the NRM and that there were no provisions in the Uganda Constitution which could not be removed or emended by the might of the NRM.⁴⁹ Military supporters of the campaign to abolish this constitutional provision threatened violence against any citizen who dared to oppose them. The country was gripped with uncertainty and fear. The government, with a largely compliant Parliament embarked on the mission of amending the Constitution. The mission was very cleverly contrived. Instead of

44 The New Vision Newspaper, 23 February 2002

45 Generally see; Mugaju Justus and Oloka -Onyango, No Party Democracy in Uganda, Myths and Realities.

46 New Vision 2 February 2002.

47 Monitor 26 January 2002

48 New Vision 26 January 2002

49 John Nasasira: Cabinet Minister in an interview published in the "New Vision", 15 May 2004.

concentrating on their real intentions of perpetuating the President in office which was the only reason for that assault on the Constitution, the schemers of the plot first paraded the idea that the people of Uganda who are the sovereign authority in the land had the right to amend their Constitution. For this purpose, the government and its supporters introduced a Parliamentary Bill to hold a referendum for the purpose of changing the Constitution. The Bill was hastily and shoddily drafted and criticised countrywide. Oblivious to reasoned arguments, the government insisted on having the Bill passed. However, government knew that many members of Parliament were vigorously opposed to the assault on the sanctity of the 1995 Constitution and the extension of one individual in the Presidency outside the provisions of the country's Constitution which had been hailed worldwide and on which the incumbent President was on record as having said he would fight to preserve its wholesomeness.

In order to silence opposition in Parliament, the government paid millions of shillings to each of the NRM members of Parliament while other public services were starved of their normal votes in the national budget. Some of the members of Parliament who publicly supported the removal of the Constitutional limits on the Presidency were generously rewarded by being appointed to high offices of state. In addition, all members of Parliament were promised fat pensions. The resolution to lift the term limit and do other unconstitutional things was easily passed by an intimidated and generously rewarded Parliament.⁵⁰

Besides the issue of the Presidency for unlimited terms, the other matters that concerned the nation was the decision to allow multipartism to operate in the country. Through national and international pressure, the NRM had by then reluctantly realised that it had to open up for other political parties which existed in the country to be seen participating in the politics and possibly, governance of the country.⁵¹ In various *caucuses* of its members and in Parliament, the resolutions to allow other political parties to operate and compete for power were passed. These resolutions were welcomed by all opposition parties and by the general public. There was therefore no need for Parliament to have resolved that a referendum be held under article 74(1)(a) since such a method would be very expensive and cumbersome. The nation could have proceeded under article 74(2) which provides:

“(2) The political system may also be changed by the elected representatives of the people in Parliament and district councils by resolution of Parliament and district

50 See the outrages poured out in the “New Vision” and “Monitor” correspondents at the time of these decisions.

51 Mainly because of pressure from donor countries.

councils, by resolution of Parliament supported by not less than two thirds of all members of Parliament upon a petition to it supported by not less than two thirds majority of the total membership of each of at least half of all district councils.”⁵²

As already noted there was national consensus on the subject of opening up the political field for all actors in the country. However, through public utterances and verbal abuse of other political activists by many NRM leaders and supporters, it was clear that many government leaders and their fans were not ready to share, let alone surrender political power to other Ugandans.⁵³ They therefore insisted on the referendum being held for two reasons. The first reason was that many of the NRM adherents hoped that the population would reject multipartism and opt to sustain the NRM in power. The second reason which emerged in utterances and comments by some of the NRM leaders later is that the referendum had been designed and intended to test the popularity of the NRM in the country. It was a kind of popularity public opinion poll. As will be seen later, the results of the referendum did not fulfil either of the reasons.

The Bill to authorise the holding of the referendum was fraught with a lot of problems from the beginning. As already said, NRM members and their sympathisers in Parliament had been paid millions of shillings each to support the referendum in Parliament and to campaign for it in the country. When the Referendum Bill was first debated in Parliament, its opponents won the vote against it. Current Parliamentary rules of debate dictate that if a bill is defeated in a session that same Bill cannot be debated again in the same session. It expires and may only be reintroduced in another session in the future. Had this Parliamentary rule of procedure been obeyed, the country would have been spared of the bother and expenses of a referendum. However, the present NRM leadership does not respect the law or rules. It uses power and numbers of its supporters whether genuine or bought to have its way, regardless. Consequently, notwithstanding the Parliamentary prohibitive rule referred to above, the top leadership of the NRM ordered Parliament to reassemble the day following the defeat and directed its members and supporters in Parliament to reconsider and pass the referendum Bill and this time, like sheep to the slaughter, Parliament obliged and ‘overwhelmingly’ passed the Bill against the inner consciences of many of its members including those who voted for the Bill.⁵⁴ All efforts to halt this illegal exercise of political

52 It later transpired that the referendum was designed by influential NRM cadres as a test for the popularity of the Movement and a trial run for the 2006 general elections. Discussions with a number of Cabinet Ministers.

53 The most outspoken opponent turned out to be an army man by the name of Kakooza who commands some kind of army with the tacit approval of the top NRM leaders.

54 Including such Ministers as Professor Mondo-Kagonyera and Honourable Tim Lwanga, amongst so many.

power were contemptuously dismissed by the NRM leadership. It is as if everyone had lost all sense of national pride and consensus.

The consequences of the referendum and the metamorphosis of the NRM and the events before and during the 2006 elections will form a separate Chapter in the second edition of my book “Constitutional and Political History of Uganda from 1894 to the Present.”⁵⁵

55 To be published by LawAfrica Publishing Ltd.

CHAPTER THREE

THE JUDICIARY AND ITS CHALLENGES: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN A DEMOCRATIC SOCIETY

I have stated elsewhere that:

Judges of the courts of judicature are not expected to comment or speak on public affairs except where those affairs are the subject of litigation and judges are actually in court presiding. Be that as it may, any orchestrated debate on the Judiciary, which, in a democracy can be constructive and necessary, will, if not properly balanced, slowly but surely undermine the standing and integrity of the institution whose role in society is not always easy but important.

As a nation therefore, we need to be made aware, if we are not already so minded, that a Judiciary whose reputation is undermined or whose tainted character is not quickly reformed cannot administer justice that is acceptable to the population. Moreover, a country without a respected Judiciary is a country without honour, or justice. It is my opinion that the people of Uganda believe in a Judiciary, which is independent, respected, fearless and impartial. This is the main reason why the Constitution and laws of Uganda made provisions to ensure the apparent and real integrity, reputation and transparency of the courts and judicial officers.”¹

Judges and officials who exercise judicial or quasi-judicial functions must act and behave impartially and with dignity and in accordance with the rigid rules of their profession. Those who do not must be identified and dealt with at once in accordance with the law. If they be judges, magistrates or councillors who are corrupt or unfit to hold office for any other reasons, they should be identified, suspended and their acts or behaviour which are alleged to be incompatible with their office must be enquired into, not tomorrow or the day after, but today and immediately as a matter of the utmost urgency. If persons who abuse the Judiciary are outside it, there are laws and means of dealing with them.²

1 In a speech delivered to the Uganda Parliamentarians’ seminar on peaceful Transition and Constitutionalism, 18 March 2004.

2 They can be charged with contempt of Court, see Miller C.J. contempt of Court, Paul Elek, London, 1976.

3.1 THE FUNCTION OF THE JUDICIARY

In 1975, my book '*Constitutional Law and Government in Uganda*' was published. In that book I examined the doctrine of separation of powers and the theory of and application of the Rule of Law. I described the judicial function as consisting of the interpretation of the law in relation to given facts of particular cases. The organs, which are entrusted with these functions are the courts of law or the courts of justice or simply, the Judiciary. The primary task of the Judiciary is to determine the legality of the different kinds of behaviour in society. A court cannot raise a matter for litigation or its own volition and then adjudicate on it. In each case it is for the individual or a group of them to raise the subject matter of litigation, whether civil or criminal, as an issue for adjudication. Once an issue has been raised, it must be heard and finally disposed of in accordance with the laws of the land and the dictates of justice in the particular case as perceived by the presiding judge or judges. Courts are duty bound to reach decisions and the law and justice demands that they do so expeditiously. This is in contrast to the classical Roman law procedure which at one period allowed a judge to declare that he was unable to reach a decision on the case because there was no express law on it.³

In the application of law, courts consider themselves bound by statutory provisions except where such provisions are inconsistent with the Constitution, which is a superior law, in which case the provisions of the Constitution will prevail, at any rate to the extent of the inconsistency.⁴ Occasionally, a court may be faced with the problem where there is no express law. The court then applies the principles and rules of the common law, equity, custom and international law. It may draw analogies from experiences and practices of courts in other legal jurisdictions. Concepts such as natural justice, fairness and special circumstances of the particular case come into play. Thus, the function of the court is to discover and apply the law to facts and acts, or behaviour and so decide between the merits and demerits raised and arguments by the parties who must be or who represent actual litigants. Generally, the court is not concerned with speculative or academic questions or hypothetical issues.⁵

In a case where there is no specific law or code which provides directions as to the source of the judge's authority, a judge will normally turn to persuasive

3 See Schlesinger, R.B: *Comparative Law*: Stevens, London, 1960.

4 Article 2(2) of the Constitution.

5 In some jurisdictions the Constitution permits institutions and Government to request the court, usually the highest in the land to give an opinion on some framed question, e.g Australia and South Africa.

precedents, textbooks, the use of the analogy and such other aiding devices as may be afforded by custom, trade usages or logic.⁶

Many legal codes lay down specific instructions as to what sources judges should resort to. The Japanese code relies on custom and, in default of them, on reason or equity. The Swiss code provides that in the last resort the judge should apply the rule which he would establish if he were acting as a legislator.⁷

In the labyrinth of the law, courts will entertain suits and applications from individuals, firms, associations, companies, governments and organisations and determine all, applying the same principles, precepts, rules, values and standards, impartially, without fear, favour or ill will towards anyone.

3.2 JUDICIAL ACTIVISM

It will have been noticed from the above description of the judicial function and the labyrinth of the law in which it is performed that there is no easy route for adjudication. Judicial adjudication is not susceptible to mathematical precision. Although judges in the common law legal systems with whom Uganda shares many features deny that they do make law in their adjudication, experience will show most convincingly that they indeed do make law. Within well-defined flexible premises, judges do make new law every time they apply an existing precedent to a new set of facts or circumstances either directly or by implication.

One of the greatest judges in the common law countries was Lord Denning. He once observed that law has two great objects, namely to preserve order and to do justice and the two do not always coincide. He went on to say that those whose training lies towards order, put certainty before justice, whereas those whose training lies towards the redress of grievances put justice before certainty. On this dichotomy, he concluded that the solution lies in keeping the proper balance between the two. He gave the example of *Donogue v. Stevenson*,⁸ where the House of Lords created a new tort of negligence. We could also mention the case of *Rylands v Fletcher*⁹ where the court stretched the law to cover a new situation and the Uganda case of *Shah v Attorney General*¹⁰ in which the Court of Appeal for East

6 Generally see Felexi F. Stumpf: Inherent Powers of the Court: Sword and Shield of the Judiciary, SJI, 1994, USA, page 308

7 See the Swiss Civil Code. cited in Schlesinger, op.cit, page 327. Article 1.

8 [1932] AC 562

9 [1868] L.R. 3.lt.L. 330

10 [1970] EA 50

Africa declined to exercise jurisdiction when they appeared to have it in order to sustain what they deemed to be justice. It has been observed by one jurist that if Parliament were to use certain words in a law it has made, and then the highest court in the land interpret that law and give it different words in meaning, it is the words of the interpretation by the court rather than the words used by Parliament which would be the law. That way, the power of the courts is certainly superimposed on the will of Parliament.¹¹

One of the great American jurists, Justice Holmes, once wrote that “*the life of law has not been logic but experience*.”¹² One of the most interesting subjects beloved of lawyers and judges alike is logic. It always follows the arguments and submissions for applying judicial precedents to new sets of facts and circumstances. In a model of decision-making, the relationship between rules, facts and results is often expressed in the form of a syllogism. The judge discovers and states the rule as the *major premise*, and discovers and states the material facts as the *minor premise* and declares the result as a necessary *conclusion*. Then the problem arises when the interpreter of this precedent has a choice either as to the scope of the major premise or how it is to be applied to the facts which are given. This whole field of law is often discussed in both Legal Method and Jurisprudence which are subjects taught in law schools.¹³

Under the common law, forms of action and rules of procedure were very rigid and complicated. The courts found ways of dealing with this rigidity and inflexibility. They developed what came to be known as principles and rules of equity to liberalise the law and avoid undesirable consequences of applying the law in a strict manner. Thus, whereas the law might have provided that in order to sue on an action there must be written evidence, if it could be shown that there was a verbal agreement, the courts would, under defined rules, force a respondent to put the agreement into writing or force him or her to do what was promised to the plaintiff even if the parties had not originally made the agreement strictly in accordance with the dictates of the law. The court would thus force a party to do what was promised to the other by an order of specific performance in order to do justice.¹⁴

In some laws made by the legislature, the legislators confer discretion on the judge as to what extent and degree the law shall be applied. In others the law

11 *AG for New South Wales v Trethowan* [1931] AC 526.

12 In the “Common Law”, 1881 page 1.

13 Lloyd Dennis: Introduction to Jurisprudence cp.11.

14 Lloyd Dennis, op.cit page 387.

maker fails to foresee everything likely to be encompassed within the four corners of the law and this leaves gaps or omissions in the law which the judge must deal with by applying concepts, principles and rules not contemplated in that particular law. The scope to which the law is to apply may be too general or too wide to be predetermined. This way, the judge's discretion is also widened and made indeterminate. Occasionally, two or more rules contained in the same law may be inconsistent with one another in which case the adjudicator is faced with the dilemma of selecting which of them to apply. He or she is called upon to reconcile the apparent conflicting provisions.¹⁵

However, even with the clearest and most unambiguous rule, the court may still have a problem. Such a rule may, if applied logically fail to achieve the desired result. Faced with this problem, a judge may resort to some other devices to achieve the desired results. The lawmaker, aware that the interpreters of the law may evade its application, will endeavour to be as precise as possible and even provide a dictionary of the law within the law itself often calls the interpretation section. All the same, the courts ingenuity to apply, extend or restrict a given law remains unlimited. The judge may read more or less meaning in the law than the legislator intended. Over the centuries, judges have developed their own rules of interpreting legal documents and instruments. In the common law countries some of these rules of interpretation are known as the *literal rule*, the *golden rule*, the *mischief rule* and the *ejusdem generis rule*, to mention but a few. Each of them was developed to serve a judicial purpose. Let us briefly consider each of the ones enumerated above. The *literal rule* means that words must be given their natural meaning and therefore where clear and unambiguous words are used in a document or a statute they must be given their natural meaning since those words reflect the clearest intention of the lawmaker.¹⁶

The *golden rule* is that the *literal rule* must be adhered to unless the words lead to an absurdity or manifest injustice in which case they must be interpreted in such a way as to avoid the absurdity or injustice. On the other hand, to compound matters, one learned author who studied all the rules of interpretation Professor Williams, in "*Learning The Law*",¹⁷ observed that the only *Golden Rule* is that there are no golden rules. Students of judicial reasoning should find this observation quite a task. Let it be said that as a general rule, if judges like a law and feel that it coincides with their sense of what is reasonable or just or what the legislature

15 See (1949) 2 Current Legal Problems, page 155.

16 [1959], 22 M.L.R. page 118.

17 Granville; Williams: *Learning The Law*; (1945) LQR 71.

intended, they will apply the *literal rule* if this approach appears to result in injustice or to lead to absurdity, the judge may apply the *golden rule*. The law may be suitable but have a limiting factor because its makers did not contemplate the events or intentions of the future. Consider European ancient laws intended to regulate modes of travel when the horse was the carrier. Then the motorcar was invented. Ancient laws had regulated the conveyance of messages by runners then came the letter, the telephone and the fax and now the e-mail. Before making new laws to deal with the new inventions, the old laws had to be stretched to cover new situations. This is where the *mischief rule* of interpretation comes in handy. Instead of applying the natural meaning of the words in the old law, the judge endeavours to discover the mischief or (wrong) which the legislator wished to prohibit at the time of making the old law. In the case of the horses as means of travel, it may have been to prohibit accidents on the highway. Can a bicycle, a motorcar or motor cycle cause an accident if it does not obey the same or similar rules in the old laws which applied to horses? If the answer is yes then, by applying the *mischief rule*, the judge comes to a decision even if it is based on a rule made before the contraption was invented.¹⁸

Where a court is not happy with the general or wide scope of the law, it may resort to the use of the *ejusdem generis rule* when applying or interpreting that law. Take a draconian law which prohibits the exercise of a human right in any office, public building, and educational institution or in any other place. A group of people are found exercising that right in a private house or in an open space or indeed in a tent. They are arrested and charged with having broken the draconian law. Will a court which believes that people should as far as possible, be allowed to exercise this particular human right peacefully and freely, convict the accused? If the court applies the *literal rule* it may have no choice but to convict, but it is equally free to utilise the *ejusdem generis rule* in order to mitigate the harshness of the draconian law.¹⁹

The *ejusdem generic rule* provides that where general words follow or precede particulars in a given law, the application of that law must be limited to the particulars and the general words preceding or following are superfluous. In this particular case you are only guilty of the offence if you exercise this right in an office, public building or an educational institution but not anywhere else. This particular law does not cover the private house, the tent or any other place not named in the particulars. The logic of this rule is that if the law maker had intended to prohibit the exercise of this right completely, the law should have

18 See. Pound R. cited in Lloyd's Jurisprudence, op.cit page 201.

19 See Hart: *Positivism and the Separation of Law and Morals*, in 71 Harvi. L. Pav, [593] 1958.

proscribed its exercise generally and completely and not enumerated the places where it may not be exercised. By so doing the law must be confined to the places named.²⁰

In the hierarchies of courts in the common law countries, decisions of the higher courts bind those of lower courts in the system if the material facts and the law in the cases before the lower court are similar or the same as those in the decision of a higher court. The binding force of a case is considered under the doctrine of *stare decisis* or the principle of precedent, but even here courts have ways of avoiding the binding ingredients of a past decision. A court which is faced with a precedent established by a higher court will consider whether the precedent involves a faulty application of other prior cases, or whether it was a decision *per incuriam* which means that the court which made it was ignorant of a binding statutory or judicial decision. Further, the court may consider whether the decision has been subsequently overruled or doubted by other judges or criticized by academic writers or overtaken by the provisions of a law made by Parliament. It may be that the higher court has doubted its own decision in subsequent cases or indeed overruled by a court higher than itself or that the case was decided by a court which is of lower or equivalent jurisdiction in the hierarchy of courts and therefore whose decisions do not bind the other court. The court may decide that the precedent is doubtful or is of unclear scope or its reasoning is weak. A court may view the precedent as having been influenced by special considerations or having outlived changes of a social or political nature. In the last analysis, the judge considering the precedent may find that the report in which it appears is unreliable.²¹

Judges and courts who strive to do justice against binding statutory rules or precedents are often accused of bending, stretching, straining and even of manipulating the law to achieve their own brand of justice. Be that as it may, the devices and rules of interpretation discussed herein simply indicate that the opportunities which are available to courts to apply the law to a diversity of situations are varied and numerous.²²

20 *Chandris v Moller*, [1951] 1 KB 240 at 246.

21 Goodhart A.L in [1959] 22 M.L.R. at page 119.

22 See Levi. W.H: An Introduction to legal reasoning, 1950.

3.3 CAN UGANDA JUDGES ENGAGE IN JUDICIAL ACTIVISM TO UPHOLD AND PROTECT HUMAN RIGHTS?

The intermittent allegations of corruption, abuse of office against ministers, public servants and the Judiciary, whether true or false, can only undermine the fabric of society and weaken faith in public administration and the administration of justice. Where persistent allegations of corruption are directed against the Judiciary by such organs as Parliament, members of Cabinet, the office of the Inspector General of Government, and the Press, the undermining of the judicial institution can be catastrophic.²³ Belief that it is no longer independent or impartial makes the Judiciary virtually useless as far as the application of the law and the rendering of justice are concerned. Loss of faith and trust in the Judiciary by the general public is as grave an occurrence as the discovery that the Executive is authoritarian or Parliament has been rendered a rubber stamp of the other organs of government.²⁴

The Constitution and the laws of Uganda endeavoured to place the Judiciary at a pedestal. The Constitution endowed it and its personnel with great privileges and immunities. In turn, it is expected to administer the law and render justice to all manner of people without fear, favour or illwill. Great responsibilities are thrust upon the Judiciary in the name of and for the benefit of the people.²⁵ Any judges who are corrupt can never administer the law or render justice to all impartially or without favour to anyone. Secondly, any Judiciary which has been consistently undermined by members of other organs of state or of the public with general accusations which are unsubstantiated will lack the courage and the credibility to do justice and a Judiciary which is conceived as tainted by corruption, abuse of office or incompetence is not a Judiciary that is likely to perform its duties happily or efficiently.²⁶

Nevertheless, the laws and regulations of Uganda and judges' etiquette contain provisions and measures to ensure that judges and judicial officers who are corrupt or incompetent can be easily weeded from the system. Where there is evidence that a judge or a judicial officer is corrupt or unfit to hold office he or she should be identified named and dealt with in accordance with the law. If we are to have a respected, independent, impartial and vigorous Judiciary, no one, let alone members of Cabinet or Parliament or the Inspector General of Government should

23 See Prunier G'érard. *The Rwanda Crisis, 1959-1994: History of a Genocide*, Fountain Publishers, Kampala, 1995.

24 *The Monitor*, 8 October 2003.

25 See the Uganda Constitution, Articles 126 and 128.

26 Gutto S: *Kenya's Petit-Bourgeoise State, the public and the rule/misrule of law*, 1982, in *int'l. J.soc.L.*, 341-363.

hesitate any longer before bringing the evidence they possess to the appropriate officers and organs of state so that, they take immediate action in making further enquiries, disciplining and removing from office the culprits. For anyone to make wild and unsubstantiated allegations which effectively undermine the institution of the Judiciary and continues to hide behind those generalised accusations is as bad as those who are corrupt and dishonest whether they be judges or judicial officers. Therefore, let those who make accusations stand up and be counted, present evidence and show their belief in a clean, bold and impartial Judiciary by insisting that the undesirables in it are removed therefrom at the earliest opportunity.²⁷

Whoever has no evidence against any named judge or judicial officer or evidence which they are able to present either to relevant bodies or to the public should be strongly advised to keep their peace if they genuinely believe in and wish to sustain an effective, impartial and independent judiciary in this country. There have been magistrates and local government councillors who have been charged with and convicted of corruption or abuse of office. They were given the right to be heard or explain themselves. Some magistrates in the lower grades and several in the higher grades have also been similarly disciplined. Many have been dismissed from the Judiciary.²⁸ There may be others who have so far evaded detection. Let the nation pursue them by exposing and investigating them legally and thoroughly by all means. However, for the generalised accusations to persist against the judiciary indiscriminately and embrace as they do, all magistrates, judges and justices of the courts of judicature without any of them named or charged, does, to my mind, verge on the irresponsibility and is a clear symptom of lack of faith in all our public institutions. The innocent in the Judiciary must also be vigorously defended and assisted to uphold the standards and integrity of the institution. Those who make false accusations against Judicial officers are doing a great disservice to the administration of justice in this country.

3.4 PROTECTION OF HUMAN RIGHTS BY JUDGES

Can Ugandan judges engage in judicial activism to advance the recognition and protection of human rights? The answer is an emphatic Yes. They require the political will to implement and public scrutiny to maintain. In its report, the Uganda Commission Of Inquiry Into Violations of Human Rights in Uganda observed rather ominously;

²⁷ Report of the Advisory Panel of Eminent Commonwealth Judicial Experts, Nairobi, 17 May 2002.

²⁸ Minutes of the Judicial Service Commission, Kampala, from 1989-2005.

42 *Kanyeihamba's Commentaries on Law, Politics and Governance*

"A country may have the best written bill of rights in the world, but if the state organs, and institutions and, leaders at all levels, and every individual in the country are not committed and do not pay serious attention to them. Human rights as so guaranteed are not worth the paper (s) they are written on,"²⁹,

The recent allegations that persons have been tortured and detained without trial under the NRM government in Uganda are most disturbing. For this is a government which came to power riding on the promise of establishing law and order, the rule of law and respect for and protection of human rights.³⁰ The Universal Declaration of Human Rights, 1948, contains a provision to the effect that:

"Every individual and every organ of society shall strive by teaching and education to promote respect for human rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance."³¹

Returning to the Commission's report, its statement that:

"Another key issue in the perpetuation of the cycle of violence in Uganda has been that of ignorance of human rights by either the law enforcement officers, state agents or their victims" and again,

"The assumption that 'those who do not oppose are safe or that only those who have offended the regime or who belong to the wrong ethnic groups need only worry' is as dangerous and fallacious as it is disastrous in Uganda", is a reminder to all Ugandans that none is immune from being a victim of human rights violations.³²

Ugandans remember with a deep sense of shame and regret that a Chief Justice of Uganda lost his life in the cause of human rights.³³ In the same period and later, many citizens including members of legal profession perished too. Many Ugandan judges and lawyers today have only recently returned from exile because previously their human rights were denied or threatened. In a previous work entitled "*Constitutional Obligation in Developing Countries*,"³⁴ I wrote that in the face of massive violations of human rights, a spate of litigation would follow with individuals and groups challenging the conduct of governments. Facing political reality, the courts tended to uphold the governments' stand in almost all the cases. In considering the actual suspension or abolition of the constitutions themselves, the courts came to be guided by a new method of changing legal norms, namely,

29 Findings, Conclusion and Recommendations, page 581.

30 UDHR.

31 *Ibid.*

32 The report of the Commission of Inquiry into violations of Human Rights, op.cit. pages 553-555.

33 In essays on Third World Perspectives in Jurisprudence, op.cit page 59.

34 Cited in Nwabueze, B.O: Constitutionalism in the Emergent States, 1973, page 239.

the act of revolution. From such cases as *Sallah v The Attorney General Awoonor William Abedemal*,³⁵ *Uganda v Commissioner of Prisons, ex parte Matovu, Madzimbabuto v Lardner-Burk*³⁶ and *The State v Dosso*³⁷ national courts along the length and breadth of the globe in the developing countries declined to contemplate any challenge against the violators of constitutions and human rights. It is reasonable to argue that these decisions, though couched in legal language, were not juridical but political. Nevertheless, they could have gone the other way too.

There is a series of other cases which invalidated the revolutions and outlawed government acts which had violated or intended to violate people's human rights, but it is also fair to say that many judges in this category were convinced that neither the revolutions nor the incumbent administration they were adjudicating about would last beyond their judgments.³⁸

With all the constitutional guarantees prescribed by the Uganda Constitution for the independence and power of the Judiciary and the protection of individual rights and freedoms, there is hope that if ever that Constitution and the hard fought for human rights are threatened and the courts we shall to the occasion and challenge the violators.

3.5 JUDICIAL RESPONSES TO VIOLATION OF HUMAN RIGHTS IN UGANDA

Article 126(1) of the Constitution provides that judicial power is derived from the people and shall be exercised by the courts established under the Constitution in the name of the people and in conformity with laws and with values, norms and aspirations of the people. Clause 2 of the same Article directs courts that when adjudicating cases of both a civil and criminal nature, they shall, subject to the law, apply the following principles:

- (a) Justice shall be done to all irrespective of their social or economic status;
- (b) Justice shall not be delayed;
- (c) Adequate compensation shall be awarded to victims of wrongs
- (d) Reconciliation between parties shall be promoted and
- (e) Substantive justice shall be administered without undue regard to technicalities.

35 [1966] EALR, 14

36 [1969]. 2.S.A. 282

37 [1958] 2 Pakistan Sup.ct.R.180

38 e.g *Fazlul Quader Chowdhury v Md. Abdul Haque*, p.L.D, 1963, (S.C. Pakistan) page 486.

To reinforce the independence and powers of the judiciary, Article 128(1) provides that in the exercise of judicial power, the courts shall not be subject to the control or direction of any person or authority. No person shall interfere with the courts or judicial officers in the exercise of their judicial functions. All organs and agencies of the state shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts. A person exercising judicial power shall not be liable to any act or omission by that person in the exercise of judicial power. The salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power shall not be varied to his or her disadvantage.³⁹

Lastly, the office of a judge in the courts of judicature may not be abolished when there is a substantive holder of that office. Upon appointment, a judicial officer takes two solemn oaths by which he or she contracts with the people of Uganda to administer justice without fear, favour or ill-will in compliance with the Constitution and the laws of Uganda.⁴⁰ Impartiality is the essence of administration of justice. Judicial officers sit as impartial arbitrators between two or more parties in dispute. They must treat all parties, be they individuals, organizations, government or the state, equally. It must also be stressed that judges are duly bound to resolve disputes on the basis of evidence produced before them and the judicial oath. For a judicial officer to base his or her decision on that officer's sympathy or with the support or favour of either or more parties to the dispute is unconstitutional and contrary to the laws of Uganda and the Judicial Oath. Occasionally, judges and judicial officers make mistakes and when they do, there are elaborate procedures for appeals and review.

Writing a forward to the *Commonwealth Human Rights Law Digest*, published by Interights, Justice A.R. Gubby, a former Chief Justice of Zimbabwe who was dismissed for his fight to uphold the human rights of the people of Zimbabwe, expressed an opinion on the importance judges should attach to the recognition of international norms and standards in upholding and protecting individual and society's rights. He wrote that "*it is beyond argument that judicial decisions emanating from Commonwealth Courts, whose reputation for the advancement of human rights is high, provide invaluable information and guidance. They point to progressive changes and innovations in international human rights law with which a municipal judge should strive, where possible to bring domestic law into harmony. A judicial decision has great legitimacy, and will command more respect if it accords with international norms that have been accepted*

39 Contrast with the view expressed by a former expatriate judge of the East African Court of Appeal, Sir Newbold: *The Role of a Judge as a policy maker* in 2 E.A.L.R. [1969].

40 Ch.8 and the Judicial Oath at page 114.

by many jurisdictions than if it is based upon the parochial experience or foibles of a particular judge or court."⁴¹

There can be no doubt that in Uganda, courts have the power and are constitutionally protected to deal effectively with disputes brought before them alleging violations of human rights. In a number of decided cases, the Ugandan courts have professionally and bravely done precisely that.

We are one of the several countries in the world where judges and courts have, from one government to another, been the subject of the displeasure and scathing criticism from other public institutions for upholding the laws and Constitution of the country and for providing legal sanctuary and succour to victims of violations of human rights. From the late and much lamented Chief Justice, Ben Kiwanuka, who dared to adjudicate fairly in a case involving a dispute between an individual and the mighty military government and died for it, to the courage of the late honourable judge Kityo of the High Court who declared illegal a decree of Idi Amin to be a joke and no-law at all, Uganda courts, judges and magistrates have endeavoured vigorously to uphold the rule of law and individual liberty.⁴²

An analysis of Uganda laws and rules of court as well as examination of the recent court decisions illustrate, quite clearly, that Uganda Courts, have not only the jurisdiction, the power and courage to intervene in cases where the rights and freedoms of citizens are allegedly violated or the exercise of government powers challenged but have been prepared to grant appropriate remedies.

The courage and principled stand that are characteristic of the Uganda Courts generally have not been without their critics. In my recently published book on "*Constitutional and Political History of Uganda, from 1894 to the Present*," I deal with this matter.⁴³

I narrate the case of *General Tinyefuza v Attorney General*,⁴⁴ Constitutional Appeal number 1 of 1997 (S.C), (UR) which is a case of a senior Army Officer who petitioned the court that both the Constitution of Uganda and the act of the President of the Republic in assigning him civilian duties outside the army allowed him to retire from the force without any further act on his part. The case went all the way to the Supreme Court which held that for an army officer to resign from

41 In the Commonwealth Law Bulletin.

42 See Paul.K. Ssemwogerere and Zachary Olum, Constitutional Application number 3 of 2004 and see the "Defender" Volume 4, number 1 January -June 1998, Kampala.

43 Ch. 7.

44 Constitutional Application number1 of 1997 (S.C), (UR).

his commission he had to comply with the rules and regulations governing army officers which, in this case, General Tinyefuza had not done.

Government and its supporters welcomed the decision as just, principled and nationalistic. Government opponents condemned it as unjust, anti-people and cowardly and as having denied General Tinyefuza his constitutional rights. In January 2000, the same Supreme Court, in the case of *Ssemwogerere v Attorney General*,⁴⁵ held that the Constitutional Court erred in law when it denied itself the jurisdiction to hear that case and ordered to hear the case. The decision was widely condemned by certain elements supportive of Government. At the same time, the opposition parties welcomed it as just and as symbolizing the impartiality and independence of the Ugandan Judiciary.⁴⁶

It would appear from the different reactions to the two judgments and others, that in Uganda, courts are perceived and hailed as independent, impartial and free when one wins a case before them but as timid and partisan when one loses. Petitioners have had mixed fortunes. Some have lost while others have won in those petitions. Some of the losers have been government supporters while others have belonged to opposition groups. Yet, some individuals on the Government side have condemned these petition results as being anti-government and biased against the National Resistance Movement. Nothing could be further from the truth.

Courts are enjoined by the Constitution to adjudicate disputes impartially. They must treat all parties, be they individuals, organizations, government or the state, equally. They resolve disputes brought before them on the evidence produced and the law applicable. Judges must render balanced judgments with compassion, fairness and justice. Above all, judges must consider and adjudicate cases without favour to or fear of anyone.

A recent decision by one of the High Court learned judges, Justice JPM Tabaro, will suffice to illustrate the point. On 12 June 2002 lawyers applied for a writ of *Habeas Corpus Subjiciendum* for production of one Lt. Benjamin Ahimbisibwe who was allegedly being detained illegally in Makindye Military Barracks. The *affidavit* in support of the applicant sworn by his wife showed that the applicant had been arrested on 4 June 2002 at Bombo Barracks and transferred to Makindye Barracks where he was being detained without trial. When the Court assembled on the 19 June 2002 for the purpose of hearing the application, the court was informed that the applicant had been returned to Bombo Barracks and

45 (Supra).

46 See. Monitor Newspaper 17 April 2004.

no record of proceedings was produced in Court to show that any court martial trial had been conducted or any lawful decision taken about him. Having cited the Constitutional and legal provisions applicable, the learned judge said:

“The Constitution is the Supreme Law of Uganda and has binding force on all authorities and persons throughout Uganda ... It is my finding that the respondents have not shown that the applicant is in detention in accordance with the laws of Uganda ... In view of this courts’ finding that the applicant is unlawfully detained, the application for release of the applicant is granted with costs. On failure to produce the applicant before court. I wish to observe that such orders (for the production of the applicant before court) are not negotiable. I would humbly add that they are vital for democratic governance and observance of the rule of law, which are fundamental for the lawful exercise of authority by any person or institution in our country.”⁴⁷

Like that of Justice Tabaro, numerous decisions by other Uganda judges are to be found in the courts archives, libraries and chambers, protecting, declaring, amplifying and outlawing activities which violate the rights and freedoms of the individual and the community as prescribed in the Constitution and the Laws of Uganda. As recently as 2002, a Uganda correspondent of the newspaper *“The East African”* remarked proudly that Ugandans have trust in their Judiciary because it is vigilant in the protection of their human rights.”⁴⁸

3.6 EXECUTIVE, POLITICAL AND MILITARY ASSAULT ON THE JUDICIARY

Last year, it was widely reported in the Uganda local newspapers that the Judicial Service Commission had expressed grave concern that anyone was contemplating setting up court martial tribunals which did not comply with the Constitution and Laws of Uganda and which were intended to by-pass the ordinary courts of the land. The then Commission’s Deputy Chairperson, who was acting as Chairperson, and one other member are Justices of the Court of Appeal and Supreme Court, respectively⁴⁹. Despite this warning, government insisted on persuading Parliament to enact a law that empowered and strengthened General Courts Martial to try anyone including civilians who may be suspected of committing terrorist and other related activities.⁵⁰

47 Tabaro J: In High Court Miscellaneous Causes Application number of 2004.

48 The Guardian, London. 22 September 2004.

49 The East African Newspaper: 5 May 2003.

50 Justice Kitumba, J.A and Justice AO Oder, JSC respectively.

In 2005, the Commission's fears were realized when one Dr Kizza Besigye, an aspirant Presidential candidate was arrested and charged with treason and rape before the High Court and in the same period taken to a General Court Martial and charged there with terrorism and illegal possession of guns. In the High Court, Dr Besigye applied for and was granted bail. On release, he was rearrested and taken to the General Court Martial where he was facing the latter charges and had refused to recognize that court's jurisdiction to try him. The General Court Martial denied him bail and he was returned to jail.⁵¹ Besigye's lawyers challenged the power and jurisdiction of the military general court martial over Besigye, a retired army officer, now a civilian. The lawyers pointed out the consequential double jeopardy of his trial in both the High Court and the military tribunal if he were to be tried more or less at the same time. The issue of whether the High Court and the General Court Martial had equal or concurrent jurisdictions was referred to the Constitutional Court. The Constitutional Court held that the General Court Martial is subordinate to the High Court. It further held that the General Court Martial had no jurisdiction to hear the charges of terrorism against Dr Besigye and twenty two other suspects and that the purported trial in the General Court Martial was illegal.⁵²

The reactions of some of the army operatives like that of General David Tinyefuza, the Coordinator of Security Services were reminiscent of Aminism. The General accused the Ugandan judges of always siding with offenders.⁵³ Appearing on television with an angered and frightening face typical of a feared terrorist, General Tinyefuza charged; *"Who are these fellows (judges)? The judges have no power to order the army. The army will not accept this business of being ordered by the judges."*⁵⁴ Referring to the learned Principal Judge, Honourable James Ogoola who typified the feelings of most Ugandan judges and members of the legal fraternity when he reacted sharply against the military assault on the High Court building in which Dr Besigye and the other suspects were being tried, the General who appears to have had some legal training, further charged; *"who appointed him? Did he go through a ballot? Did he come there by accident? We have given them power but they should not order us about." These are neo-colonial systems. If you look at the neo-colonies and the legal regimes in them, they are absolutely confused.*⁵⁵

51 Court Martial Act..

52 New Vision Newspaper: 22 December 2005.

53 The New Vision Newspaper: 1 February 2006.

54 Daily Monitor Newspaper: 3 February 2006.

55 Daily Monitor Newspaper: 3 February 2006.

It is noteworthy that Dr Besigye has strenuously denied that he has ever been involved in subversive or terrorist activities and that he is completely innocent of the criminal charges levelled against him. On the charge of rape, the assessors advised the trial judge to acquit Dr Kiiza Besigye and declare him completely innocent of the charge. The Uganda Constitution like all the others of modern and civilized states provides “*that every person who is charged with a criminal offense shall be presumed to be innocent until proved guilty or until that person has pleaded guilty.*”⁵⁶ General Tinyefuza’s irrational statement presumes the contrary that is, that Dr Besigye is actually guilty of the offences with which he is charged. This may not be surprising since the General appears to be reechoing the words of the Uganda Commander-in-Chief who earlier had stated publicly, that the state has done its duty and brought Dr Besigye to court and it is now for Dr Besigye to prove his innocence.⁵⁷ No judicial officer or court in Uganda would, under the present Constitutional and legal arrangements, accept the beliefs which seem to be inherent in the statements of both the General and the President.

Another General, General Elly Tumwine, an artist and current head of the General Court Martial exhibiting the same sentiments, also rejected the courts’ judgment and actually proceeded to summon the terrorism suspects to appear before his court again for fixing the date of hearing their case. The Executive appears to condone the latest developments on the violation of the independence of the Judiciary.⁵⁸

Earlier, when Dr Besigye and his co-accused appeared before the High Court for trial, the High Court was besieged by armed personnel who are members of the Uganda Peoples Defence Forces. They dressed in black and are known as the *Black Mambas*. They caused fear amongst judicial officers, staff, civilians and lawyers. Both the Chief Justice and the Principal Judge reacted angrily against the siege. In his statement of disapproval, the learned Principal Judge declared that the day the *Black Mambas* besieged the High Court building will always be recalled in the country’s history as a day of infamy. The learned Principal Judge regarded the siege as the rape and defilement of the temple of justice.⁵⁹

At their appearing in court before three trial judges, consecutively, the judges each released the suspects on bail as permitted by the Constitution laws of Uganda

56 *Ibid.*

57 Article 283(b).

58 In an interview with a reporter on the B.B.C. see Sunday Monitor: 11 December 2005.

59 The New Vision: 7 February 2006.

but each time they were rearrested and detained on the orders of the General Court Martial.⁶⁰ In the confrontation between the Judiciary and the Army, the Prisons' Commissioner ignored the orders of the Courts and obeyed those of the military forces notwithstanding that the Constitution clearly provides that courts martial are subordinate to the High Court and that the Uganda Peoples Defence Forces should be non-partisan, national in character, patriotic, professional, disciplined, products and subordinate to the civilian authority as established under the Constitution.⁶¹

It may be recalled that in the case of *General Tinyefuza v Attorney General*, (*supra*), David Tinyefuza petitioned that he no longer wishes to stay in the army which he despised and the reasons given both in the petition and in the evidence given on his behalf show that the General was not only defying Parliament, the President and the Army but was hoping that the court would use its power to protect his rights against those institutions and direct them to respect and protect the rights of the General. It is a remarkable phenomenon of human nature that the same General should have forgotten so easily and so quickly.⁶²

When Dr Besigye next appeared before the High Court, Justice Katutsi, J. ordered the Commissioner of Prisons to produce the accused, Dr Besigye and give reasons why he was still detained in prison notwithstanding the earlier High Court order granting him bail. This order was made following Dr Besigye's lawyers' application for the writ of *Habeas Corpus Subjiciendum*. Amidst the drama of heavy police presence in and around the High Court building and the open secret in government circles that Dr Besigye should remain on remand in the maxim Luzira Prison, the learned trial judge declared the continued detention of Dr Besigye unlawful and ordered his release forthwith. In his illuminating ruling on Besigye's detention, the learned judge said, *inter alia*;

"From the 2 December 2005 when the order of Kasule, Ag. Judge was signed, the General Court Martial ceased to have anything to do with the applicant. That being the view I take of the law, from the 25 November 2005, the applicant has been in illegal detention. If sanity is to be regained, the applicant must be given his freedom to be on bail as granted by the Principal Judge. The total sum of the detention of the applicant at Luzira is illegal and unlawful. He should be released forthwith unless held on other lawful orders. The applicant will get the costs of this application. I order accordingly."⁶³

60 See also Chief Justice Odoki: Judiciary will not be cowed by the Military – vows Odoki in the East African Weekly: 4 December 2005 at page 5.

61 The New Vision Newspaper: 21 December 2005.

62 Article 268.

63 *Supra*.

It is therefore, with confidence that it must be declared publicly and proudly that judicial responses to violation of human rights in Uganda, both actual and potential, are decisively positive even in cases where the judges face danger.

3.7 ACCOUNTABILITY IN THE JUDICIARY

In my opinion, accountability as used in reference to the judiciary implies two concepts, namely, the manner in which those who exercise judicial functions do so and, secondly accountability for the way resources allocated for the administration of justice are utilised.⁶⁴

Judges and officials who exercise judicial or quasi-judicial functions must act and behave impartially and with dignity and in accordance with the rules of the legal profession as buttressed by the judicial oath. Those who do not must be identified and asked to account for their deviance and if needs be, they have to be dealt with severely in accordance with the law.⁶⁵

Currently, there is an outcry in Uganda against alleged corruption in the judiciary. If there be judicial officers who indulge in this illegality, it is incumbent upon the accusers to name them so that the relevant authorities can suspend, discipline and may be ultimately remove them from their posts as persons who are unfit to hold judicial or other public office. Any acts or incidents of behaviour which are alleged to be incompatible with their office must be enquired into immediately and not simply be discussed generally as a matter of gossip and speculation. If persons who abuse the legal process are outside the Judiciary there are other laws and procedures, which adequately deal with culprits.⁶⁶

Just as it is very necessary that officials in the judiciary who are corrupt, incompetent or otherwise unfit to hold office, should be identified, investigated and dealt with in accordance with the law, those persons who indulge in the exercise of undermining the Judiciary by making unsubstantiated accusations against it should be restrained. Those who claim that they know there is corruption and abuse of office in the Judiciary should be made to reveal all they know or keep silent when they do not have credible proof for the accusations they parade publicly. This however is not to say that the allegations of corruption in the Judiciary are totally groundless. Cases of corruption involving judicial officers in magisterial areas and those involving officials who work as support staff in the

64 Katutsi J. Judgment.

65 In this respect, the Secretary to the Judiciary is the overall Accounting Officer in the Judiciary.

66 Such as being held in Contempt of Court.

courts of judicature have been amply documented and proved and disciplinary action including dismissal have been taken against some of the culprits.⁶⁷

With regard to accountability for the property, resources and equipment of the Judiciary, each judge as every judicial officer has a very important part to play in their custody, proper use and utilisation.⁶⁸

Admittedly, the Uganda Constitution entrusts the primary responsibility with the honourable Lord Chief Justice as head of the judiciary who also has responsibility for the administration and supervision of the courts of Uganda.⁶⁹ Nevertheless, each judge and judicial officer in their respective positions and office, assists in the fulfilment of these obligations.

Chief magistrates, registrars and clerks in one way or another, have custody of judicial property of some sort for which they are all accountable. As judicial officers, we all have access to and utilise resources and equipment provided at the expense of the taxpayer and for which we are all accountable. Some of the judges, magistrates and other officers in the Judiciary are actually accounting officers for the moneys and property in their custody and under their control. In this regard, they are all as accountable as any other public officers. Consequently, the Judiciary is required not only to undertake responsibility for internal discipline or self-criticism but also accountability within its internal operations.⁷⁰

3.8 JUDICIAL BALANCING ACT

In criminal justice, experience reveals many facets of attempts by the Judiciary to balance two sets of values. The first is the preservation of the rights and freedoms of the individual while the second is the maintenance of law and order, the successful prosecution of criminals and protection of property.⁷¹ With regard to the first, presumptions of innocence and the necessity to prove crimes beyond reasonable doubt can only be for the general welfare of society as a whole.

Mistaken identity of suspects, malicious entrapment by investigating agencies, false confessions and errors in presenting or assessing evidence may lead to some innocent persons having to pay heavily for crimes they may have not committed or

67 Reports of the Judicial Service Commission, Kampala.

68 Property found in Chambers and Offices range from furniture, books to computers and stationery.

69 Article 133.

70 The Committee on Ethics and Integrity and the Peers Committee in the Judiciary play an important role in this regard. See the U.S.A National Judicial College: Modern Judicial Ethics University of Nevada, Reno, U.S.A.

71 In search of Freedom and Prosperity: op.cit page 1.

participated in. on the other hand, public sympathy must be expressed and sustained in favour of state agencies and personnel whose duty it is to prevent, fight and prosecute crime.⁷² Misunderstanding of how modern criminal justice operates in society may lead to hostility and indifference on the part of the population and this may result in low returns of fully investigations and convictions of crime. It is therefore necessary to strike a balance between the two sets of aims in society. This balance is to be found somewhere between the words of Prof. Dworkin and those of Mwalimu Nyerere. The former state that:

“Someone has a right when he is entitled to insist on doing something done even though the general welfare of everyone else is harmed thereby.”⁷³

On the other extreme, Mwalimu J. Nyerere once remarked:

“I agree that in the idealist sense of the word, it is better that 99 guilty men should go free than that one innocent man should be punished. But in the circumstances of a nation like ours, other factors may well arise in which is better that 99 innocent people should suffer temporary detention than that one possible traitor should wreck the nation. It certainly would be complete madness to let 99 guilty men escape in order to avoid the risk of punishing one innocent person. Our ideals should guide and not blind us”⁷⁴

Nyerere’s views are a reflection of most Africa to-day and contrasts sharply with the Western concept of individual liberty which is often enjoyed and exercised at the expense of the community at large. The balance between the two extremes will always be aimed at if the debate about it is continuously and transparently held from generation to generation in a democratic fashion. To advance one side and accept it at the expense of or suppression of the other may be regarded as political arrogance. Such arrogance encourages intolerance in turn. Either way, it could end in anarchy or authoritarianism,⁷⁵ neither of which is a panacea for constitutionalism.

In developing countries, the overwhelming majority of citizens who seek justice in courts of law are poor. The common law idea that a judge who presides over a trial is an impartial arbitrator is meaningless to many of such litigants especially when they are legally unrepresented. Consequently, it should be permissible for a presiding judge or judicial officer to temper justice with compassion. In a case where the state is adequately represented by a lawyer and the other party is a poor litigant who is unrepresented, it should be possible for a

72 ch.12 of the Uganda Constitution.

73 Taking Rights Seriously, 1978, 1-28.

74 Inaugural lecture: University of Dar-es-Salaam, Reprint in (1964): Review of Contemporary Law: Nyerere’s Writings and Speeches, 1952-1965, page 123.

75 See G.W.Kanyeihamba: Constitutional and Political History of Uganda, op.cit. page 331.

merciful judge to intervene at appropriate stages of the hearing to protect the constitutional and legal right of all parties in the trial.⁷⁶

Accused persons who are not legally represented are often caught out in legal and procedural arguments which they do not always apprehend. It should be possible for a judge or presiding officer to explain, in simple terms, to the person who is not represented in court that that person is entitled to and can apply for bail instead of letting the person who is legally represented to be the ones to take advantage of this rule. In Common Law countries of Africa, persons accused of grave offences such as treason, murder, aggravated robbery and rape, are in the happy position of being legally represented while persons accused of less seriously offences have to endure criminal allegations made against them without representation.⁷⁷

In the making, implementation and application of laws, the Executive arm of Government possesses greater weapons of persuasion and decision than Parliament and the Judiciary⁷⁸ in that it has the purse, the police, the army and all the other national security forces. Indeed, as Prof. Nsibambi once remarked, the Executive arm of Government has the sword. In our opinion that sword was handed to the Executive for the protection of the people and it should be the people and not the Executive or any other organ of state to determine and declare what interests are to be protected by the sword. In any event, the sword must be used constitutionally and should be subject to both political and judicial restraint. Nsibambi further observed that;

“In their operational relationship, each of the three arms of the state impact on each other's (S.C) performance in such a way that none can achieve or fulfill its functions without the support of the others”.⁷⁹

We must agree with the Premier that the three arms of Government can only be effective if they respect one another and act harmoniously in a spirit of mutual respect and the principle of give and take. Lately, the Executive and the UPDF have each behaved as if the others are essentially subordinate and subservient and un beholden to the other two. This is a dangerous development which should be discouraged at once. We need to rededicate ourselves to the ideals of the 1995 Constitution as the Supreme Law of the Land.⁸⁰

76 See: Beyond The Horizon: Justice in the 21st Century: Commonwealth Conference Report: CMJA Edinburg 2000 Conference.

77 Article 28(2)(e).

78 Nsibambi Apollo: In a mimeo – published and circulated to both Parliament and the Judiciary.

79 *Ibid.*

80 *Ibid.*

3.9 AN IDEAL JUDICIARY

As part of last years Uganda Human Rights Commission National Dialogue on the Uganda we want, the organizers invited representatives of the major institutions of state including Parliament, the Executive, the Judiciary, the UPDF, the Police and Prisons and Press to present brief statements on what kind of institution each wished. I was asked to represent the Judiciary. I gave the following characteristics of an ideal Judiciary I want.⁸¹

- (a) Independent
- (b) Courageous
- (c) Self-accounting
- (d) Uncorrupt and incorruptible
- (e) Respected by right-thinking members of government and the public
- (f) Dispense justice impartially and fairly.
- (g) Where Judges, Magistrates, other Judicial Officers and Support Staff respect one another, members of the public and public institutions.
- (h) A Judiciary which is composed, supervised, disciplined and managed strictly in accordance with the constitution and laws of the country.
- (i) A Judiciary which is not afraid or timid to protect human rights in all its manifestations or to oppose persistently forces whose intentions are to undermine its independence and integrity.
- (j) A Judiciary which is an example of all other organs of and personnel in the state with regard to its functions, character and integrity of its personnel and balanced judgment.
- (k) A Judiciary which fights corruption and abuse of office without waiting for decisions or actions from institutions or persons outside it however important or influential.
- (l) A Judiciary which will not tolerate corruption, incompetence or abuse of office for longer than is legally and practically acceptable.
- (m) A Judiciary which fights vigorously for its independence and rights and the rights of others.
- (n) A Judiciary which operates on meritorious principles regardless of the status or origin of the subject matter, whether of person, institution or object.
- (o) A Judiciary which delivers its judgments and decisions quickly and transparently.

81 5 to 6 October 2005.

- (p) A Judiciary whose decisions are properly recorded, publicly pronounced and published for general knowledge.
- (q) A Judiciary which is adequately facilitated and who judges, magistrates and support staff are well paid.
- (r) A Judiciary which encourages research and retraining of its personnel.
- (s) A Judiciary which appreciates the problems of the marginalized and weak members of the society in which it operates.
- (t) A Judiciary which is not afraid to criticize itself or accept criticism of it by others.
- (u) A Judiciary of which I and other members of the public are proud of because of its courageous stand and decisions on controversial issues, regardless of what those outside it think of that stand and those decisions.

CHAPTER FOUR

THE EXERCISE OF EXECUTIVE POWER

Most Constitutions prescribe the different functions performed by the three organs of government, namely the legislature, the executive, and the judiciary.¹ The legislature is that body within a state which is entrusted with the making of new law and the alteration or repeal of the existing law. It is also the organ which is designed to monitor and bring the executive to account. It can also, vary, limit or expand the jurisdiction of the courts by law, provided all these are in conformity with the constitution. Without a legislative body of some sort, no modern state can provide laws readily enough to meet conditions of development obtaining in society.

Nowadays, the most powerful instrument for legal change in the state is legislation. On almost every front of development, there must be some law that lends legality, legitimacy and credibility to what is proposed and done in the interest of the public. However, it is conceded that Parliament must obey the rules which are prior to its sovereignty.² Thus, Sir Owen Dixon said;

“The law existing for the time being is supreme when it prescribes the conditions which must be fulfilled to make a law but the question of what may be done by law so made, Parliament is supreme over the law”³. The law meant here is of course one which is subordinate to the Constitution.

The executive is the body in the state which is entrusted with the administrative functions of government in accordance with the constitution and laws of the state. It is the organ which initiates and frames most public policies of governance, development and security and, executes the same in conformity with the laws and constitution of the state. It makes the choice and priorities of the manner and time in which the policies shall be implemented. In this regard, members of the executive do make and publish a lot of subordinate legislation by way of rules, regulations and statutory instruments to amplify and supplement the laws made by

1 See Norman Small, Lester S. Joyson, (eds). *The Constitution of the United States of America*; Senate, document number 39 U.S Government printing office, Washington 1964, for a comprehensive examination and Separation of Powers of Government.

2 In *The Law and the Constitution*, L.Q 1965, P. 590 at 604.

3 *Ibid.* see also *A.G for New South Wales v Trethowan*, 1931; AC 526. *A.G for Ontario v A.G for Canada*, [1947]; AC, 127 *Stockdale v Hansard*, 1839, L QB 294

Parliament or interpreted by the courts. It is the same organ which finds, distributes, grants or withholds public funds for any public project or development however defined and described. In terms of social, political and economic change and functionally, the executive arm of government has increasingly become the most important of the three organs of government.⁴

The Judicial function consists of the interpretation of the law and its application by rules or discretion to facts of particular cases. The institutions which are entrusted with these functions are the courts of law or the courts of justice or simply, the judiciary. The primary task of the judiciary is to determine the legality of the different kinds of acts and behaviour in society. This does not mean that a court may investigate those acts or behaviour on its own volition. In each case, it is for the individual or a group of them to raise the subject matter of litigation, whether civil or criminal, as an issue for adjudication. Once an issue has been raised appropriately and in a court with jurisdiction on the subject, that court has a duty to hear the parties, reach a decision and finally dispose of the matter in accordance with the laws of the land and the dictates of justice in the particular case as perceived by the presiding judge or judges. Courts are duty bound to reach decisions and justice demands that they do so expeditiously.⁵ This may be contrasted with the classical Roman Law procedure which at one period allowed a judge to declare that he was unable to reach a decision on the case because there was no express law on it.⁶

In the application of law, courts consider themselves bound by statutory provisions except where such provisions are inconsistent with the Constitution, which is a superior law, in which case the provisions of the Constitution will prevail, at any rate to the extent of inconsistency. Some states give room for judicial latitude and discretion. Occasionally, a court may be faced with a problem where there is no express law. The court then applies the principles and rules of the common law, equity, custom and international law. It may draw analogies from the experiences and practices of courts in other legal jurisdictions. Concepts such as natural justice, fairness and special circumstances of the particular case come into play. Thus, the function of the court is to discover and apply the law to facts and acts, or behaviour and so decide between the merits and demerits raised in submissions and arguments by parties who must be or who represent actual

4 See Ghai Yash: *Reviewing the Constitution: The Constitution of Kenya*, Nairobi; 2002, page 8.

5 See Uganda Constitution Article 126(2).

6 Buckland and Mcbair *Roman Law and Common Law*, 173, et sq.; Vesey – Fitzgerald in 14 *J.Comp. Leg.* (1932).

litigants. In common law countries generally, courts are not concerned with speculative, academic, or hypothetical questions.⁷

Nevertheless, where there is no specific law or code which provides directions as to the source of the judge's authority, a judge will normally turn to persuasive precedents, textbooks, the use of analogy and such other aiding devices as may be afforded by custom, trade usage, and logic. Many codes lay down specific instructions as to what other sources judges should resort to. The Japanese Code relies on customs and, in default of that, on reason of equity. The Swiss Code provides that in the last resort, the judge should apply the rule which he would make if he were acting as a legislator.⁸

In this labyrinth, courts will entertain suits and applications from individuals, firms, associations, companies, governments and organisations and determine all, applying the same principles, precepts, rules, values and standards, without fear, favour on ill-will.⁹

In consequence, the role of the Executive must be understood and appreciated in relation to those of the other two organs of government.

In their report on Uganda, Dr John-Jean Barya and Mr Simon Peter Rutabajuka for the Economic Commission for Africa, the learned authors examine the effectiveness of the main arms of government in ensuring democratic, participatory and accountable governance.¹⁰ They assert that institutional effectiveness and accountability refer to the existence of checks and balances among the three arms of government. It also refers to respect for the rule of law by all arms of the state especially the executive. They also see it in the quality and manner in which the state guarantees for its citizens thorough provisions of or ensuring the provision of health, education, housing, water, transport and other utilities. They examine the institutional effectiveness and accountability in terms of the extent to which civil society exists and operates and in particular the autonomy in which it carries out its activities and lastly, they examine the place and importance of the media in society and its development¹¹

7 *Contrast Collingwood v Hone and Colonial Stores*, [1936] 3 All ER 200 with *Reinhardt v Newport Flying Service Corporation*, 232 N.Y. 115.

8 Article 1. Also see White cross, George: *In A Textbook of Jurisprudence*, (3 ed) et. Oxford reprint. 1967, page 195.

9 In accordance with the Judicial Oath. See Uganda Constitution page 114.

10 See Maina P.C. in E.A.J.P.H.R. Volume 2 number 2 page 158.

11 Addis-Ababa. Ethiopia, 4 November 2002.

4.1 TOLERANCE IN THE EXERCISE OF EXECUTIVE POWER

In public and private affairs, tolerance connotes the ability of a person, leader or group of them to allow and forebear other persons to hold and express different opinions or act differently even if they do not agree with the people who are inclined or advised to exercise tolerance. It is an art of indurance or patience which characteristically permits variation in opinions and behaviour whether of a political, religious or social nature. Tolerance was once epitomized by a liberal politician who expressed total and unequivocal disagreement with the view of his opponent but also his unconditional commitment to fight to death in his efforts to protect the right of that same opponent to continue expressing those views without interruption.¹² Tolerance is often equated with liberal democracy. liberal democracies depend on values beyond what is lawful or constitutional or the dictates of the concept of majority rule. It is not often appreciated that intolerance and dictatorship can exist and often do under majoritism of a democratic phenomenon. Thus, an American scholar by the name of Ronald Dworkin identifies the Bill of Rights as designed to protect individual citizens and groups against certain decisions that a majority of other citizens might want to make even when that majority acts in what it believes to be the general or common interest.¹³

The exercise of governmental powers may be legitimate and constitutional but the manner in which they are exercised and its consequences may have to be buttressed by the rule of law and constitutionalism. As Nwabueze once wrote:

“The term ‘constitutional government’ is apt to give the impression of a government according to the terms of a constitution.

There are indeed, many countries in the world today with written constitutions but without constitutionalism. A constitution may also be used for purposes other than as a restraint upon government. It may consist to a large extent of nothing but lofty declarations of objectives and a description of the organs of government in terms that import no enforceable restraint; such a constitution may indeed facilitate or even legitimize the assumption of dictatorial powers by the government. Indeed, it is not an exaggeration to conclude that for many countries, a constitution is nothing more than a proclamation of what governments are entitled to do, and often do, to restrain the liberty of citizens or deprive them of proprietary interests¹⁴. In a number of Commonwealth countries, constitutions are perceived by those in power, not as protectors of the human rights and the liberties of the individual but as instruments for legitimizing the exercise of power. For the opponents of these rulers, constitutions are understood in terms of the

12 See Le Suer, Andrew Herberg Javan and English Rosalind: (eds.), *Principles of Public Law*, (2 ed) London, 1999.

13 Ronald Dworkin: *Taking Rights Seriously*, 1–28 (1978).

14 B.O Nwabueze: *Constitutionalism in Emergent States*, 1973.

government's legitimacy to exercise arbitrary power, to impose restrictions on certain freedoms and rights and to do whatever the ruling oligarchy deems necessary and in its interest. It is the kind of constitution that revolutionaries and leaders of military coups d'état find an easy target and the overthrow of which encourages further stringent measures against the population.¹⁵

Apart from governmental restraint, individual rights and freedoms are protected mainly by unhampered access to the jurisdiction of the ordinary courts whose independence and impartiality are constitutionally guaranteed and which must be transparent in the performance of their functions. With notable exceptions, it is access to court that is often projected and intended to moderate the behaviour of rulers while injecting a sense of tolerance all round. Similarly, the idea of constitutionalism does not depend on the letter of the law or on the constitution or indeed on its correct interpretation. While these attributes are necessary preconditions, they need to be supplemented by other considerations such as equity, fairness and the hearing and respect of minority views so as to bring into focus the needs and desires of society as a whole. That is the measure of constitutionalism. Thus, it may be constitutional for courts to be independent and impartial in adjudicating disputes between one individual and another or groups of them and the government but if the courts' decisions are ignored or not implemented, there is no constitutionalism.¹⁶

The government may be advised not to proceed with a certain policy because of its harshness to citizens but government may insist upon it by persuading Parliament to legitimize it with the passing of the desired law. The law will certainly be constitutional but the policy may not reflect what is constitutionalism because it denotes government by law and not under the law, which itself symbolizes intolerance.¹⁷

For many countries of Africa, the period between the grant of independence by the colonial powers and the struggle to establish national ethos and democracy was characterized by suspicions and hatreds between the peoples inhabiting those countries. The conflicts therein were such that solutions to them could not be provided by the dictates of democracy alone.¹⁸

15 See G.W Kanyeihamba: *Constitutional Law and Government in Uganda*, E.A.L.B, 1975 from page 451.

16 The Defender, Volume 8 number 1, page 21.

17 Cf: *The aftermath of Marbury v Madison* I.C.R. 137 (1803) (U.S.A) and *Harris v Minister of Interior*, [1952] (2) S.A. 428, with regard to government under or by law.

18 Most independence constitutions in Africa had to have provisions protecting minority interests against majorities under democracy, e.g those of Kenya, Zimbabwe and Uganda.

A great deal of compromise and co-operation between opposing communities and factions was, in certain instances, enhanced by monolithic organizations while yet in others only multiple party organizations could provide the answers. In others, government by delegations from all sections of the country was the only logical answer for accommodating the fears and aspirations of everyone¹⁹. The idea of winner takes all or of the holding of victory rallies and feasts in closely contested and controversial campaigns was to be discouraged or at any rate, tinged with moderation and tolerance.

In cases of sharp differences in society, it is imperative that predetermined rules of constitutionalism be entertained with restraint, accommodation and tolerance. An important aspect of the new understanding in governance should be the education of leaders that neither they nor anyone else has a monopoly of wisdom and intelligence or knowledge at all times to originate the right policies or solutions to current national and world problems.²⁰ Leaders need to accept and appreciate electoral and political defeats and loss of power as proper attributes of democracy and constitutionalism. The system of public administration must guarantee the lives and happiness of previous or ousted leaders in a manner that will discourage them from clinging to power by whatever means as the only way of protecting themselves. It needs to be emphasized again and again, that in developing and poor countries, the distribution of and access to the national wealth and resources are as important as the maintenance of law and order, legalism and constitutionality are as important as the political reality of the situation, just as the concept of democracy needs to be balanced fairly evenly with the people's right to be governed well and peacefully.²¹

In most developed countries, the function of law is determined largely by the national ethos, social, culture and political ideology which have long histories behind them. In developing countries, these concepts and ideas are still in the formative stages. Consequently, public law must be directed to their evolution, growth, consistency and nurture. Regrettably, in some countries, the courts which were established as the last bastion in the defence of the freedoms and rights of the individual and against the oppression by or injustices of public authorities, have been reluctant to confront the executive while parliaments, the symbols of democracy and liberty have occasionally hesitated or showed partiality and timidity

19 In others, such as the U.K, devolution of power was seen as the answer to such problems.

20 There has been this tendency amongst contemporary African leaderships culminating in the desire and attempts to alter constitutional provisions that limit terms of office for the leaders.

21 See Motsoko Pheko: *Apartheid: The Story of A Disposed People*, Marram Books; 1984. page 160.

in challenging maladministration and abuse of power by members of the executive.²²

It is therefore imperative that both arms of government stand up, uphold and protect the values for which they were created. In the political, economic and social crises that tend to characterize the developing countries, there can be little doubt that problems of constitutional instability and underdevelopment will increasingly bring pressure to bear upon the communities and governments concerned. The solutions to these problems will consist, in part, a constant review of the constitutionality of government action and on the other, tolerance on the part of both the rulers and the governed.²³

In an illuminating guide to the Kenya Constitution, Prof. Yash Ghai has enumerated and described the functions of government.²⁴ In his view, the most important functions include the making of laws, policy making and implementation, the management of the economy, ensuring that law and order and the security of the population are maintained and protected, enforcing laws which protect people's lives, families and property, safeguarding national resources not only for the present but increasingly for future generations, satisfactory resolution of disputes on a variety of matters between members of families, manufacturers and consumers, trading partners, employers and employees, citizens and public authorities, landlords and tenants, educational institutions and students and so on.

Ghai maintains that the satisfactory resolution of these disputes is essential to the security, stability, economic and social development of society. The state has the ultimate responsibility for ensuring national unity and social cohesion and for fostering a sense of public responsibility and commitment to the public good.

In my book *"Constitutional Law and Government in Uganda, 1975*, I observed that three factors appear to be paramount in any reasonable Constitution, namely democracy, the rights of the individual and the maintenance of a just, good and effective government of the people.²⁵ In the last analysis, a Constitution is judged according to the kind of government it allows to operate in society because government is the principal agent of the state and the initiator and implementer of the major policies in the country.

22 See Mark Cooray: Exportability of Representative, Democracy to the Third World: in *Essay on Third World Perspectives in Jurisprudence*; Malayan Law, Journal Pte. Ltd, 1954.

23 *Ibid.*

24 See Ghai, op.cit. page 9.

25 *Ibid.*

Basically, there are three types of governments which are often discussed by constitutional jurists. The first form embraces all those governments which are termed autocracies. An autocracy is defined as government by one ruler. It may be a despotism or dictatorship. The second form consists of governments known as oligarchies. An oligarchy is a rule by a few individuals. These may be members of a family or landed gentry, feudalists or a military junta. The third is what is fashionable nowadays even though its origins are embedded in Greek history. It is described as a democracy. Apparently, a democracy is said to be a government of the people by the people for the people.²⁶ In our view, it matters very little to the lives and welfare of the people what form of government is adopted in any given country. Government is a matter of making decisions, maintaining law and order, securing state security and distributing the resources of the country to those who deserve or need them.²⁷ In fact, there is an element of each form in all of them.

There is an element of democracy in an autocracy because ultimately, the rule of the dictator rests on the fact that public opinion accepts or tolerates it. A dictator must have advisors who are closest to him or her, thereby embracing the idea of oligarchism in a dictatorship. In democracies, the lead is normally taken by a few individuals who satisfy the test of an oligarchy. These dedicated few must have a Chairperson or President. If the Chairperson or the President is very powerful and intolerant, he or she will have the makings of an autocrat or dictator. All this goes to show that an autocracy as well as an oligarchy can easily be accommodated in what may appear to the supporters and observers of the structure alike as a democracy. It will suffice to analyse the workings of the Constitution of countries which to-day describe themselves as democracies such as the USA, UK, Russia, India, Kenya, Uganda and Zimbabwe, to appreciate the notion and practice of this form of government.²⁸ All the enumerated countries and many others which are described as democracies possess governments which differ greatly in many fundamental respects. It seems that in each case, it is the ruling oligarchy which defines the meaning of democracy for its brand of governance. In each case then, the question becomes how democratic a country is and who is asking the question and answering it.

In theory, three conditions are recognized as being necessary in an ideal democracy. These are the supremacy of the people, the rights and freedoms of the individual and equality of the people before the law. Since 1789, liberty has been

26 op.cit. page 114.

27 A term attributed to Abraham Lincoln of the U.S.A: Also see: Kabwegyere Tarsis Bazana: *People's Choice, People's Power*; Fountain Publishers: 200, Kampala, from page 1.

28 See Harvey and Bather: *The British Constitution*, (4 ed) 1977, ch. 12.

recognized as the right to do whatever is not contrary to another person's liberty. It is nowadays theorized that a democracy is a political system of a given country in which the following are clearly evident: universal suffrage, regular elections fairly and correctly conducted, freedom of political thought and association, freedom of speech, writing, publishing and assembly, tolerance of minorities, freedom of the press, and an independent and facilitated judiciary and equality in four senses, namely civil equality, equality before the law, political equality and equality of economic opportunities.²⁹

Arguably, only in *Utopia* can a government be perceived which is capable of performing all the functions and fulfilling all the conditions we have mentioned and examined. However, the said functions and conditions together constitute the litmus paper against which all governments are tested. Governments which endeavour to and achieve the greatest number of scores against the test are said to be amongst the best in the World. Governments which score the least of points are said to be amongst the worst.³⁰

In the case of Uganda, there is ample evidence and documentation to suggest that as a state, the country has never been amongst the best as far as its governments are concerned. The independent government of Milton Obote was found wanting and overthrown by the military government of Idi Amin. The Amin regime published eighteen reasons why it found it necessary to overthrow Obote and his administration. The Amin *junta* was in turn defeated in a civil war. The victors published a catalogue of the failures and the misdeeds of that government. The short administrations of Prof. Lule, of the Military Commission and of General Tito Okello also failed and their shortcomings and evidence of misgovernance have been analysed and published in diverse books and articles.³¹

The NRM government which has ruled Uganda since 1986 assumed the mantle of political power with the greatest of expectations that it would be among the best governments in the World.³² Indeed, in its bush war against the forces of repression and the first years of its rule, it promised and performed to the levels of those expectations. It is not surprising either that it has been during this rule that the greatest number of analyses, publications and filming have been undertaken and recorded revealing what went wrong before. The same Government appointed the

29 See Backman, B. "Whose Democracy? *Bourgeois v Popular Democracy in Review of African Political Economy*, Volume 45/46.

30 See Uganda Constitution, 1995: Social and Economic Objectives, page (ii).

31 See Vishnool Bhagwan and Vidya Bhushan: *World Constitutions*, Sterling Publishers Private Limited, Repr. 1999, New Delhi.

32 See Kabwegyere, T.B., *op.cit.* pages 186-191.

Commission of Inquiry into Violation of Human Rights. The findings, conclusions and recommendations contained in its voluminous report is one of the most important public documents preserved in this country's archives.³³ The story of the NRM-NRA told in the *Mission to Freedom* is another classic publication detailing the omissions and transgressions of past governments in Uganda. One of the contributors to *Mission to Freedom* is President Yoweri Kaguta Museveni himself. He wrote:

"At the time of launching the armed struggle, many people in the country did not know what it was all about. Moreover, the majority of Ugandans knew there was something drastically wrong in Uganda, but they did not know that anything could be done to remedy the situation ... The purpose was furthermore to use the paper to keep people informed about what was taking place in Uganda in general and with regard to the resistance war. We also wanted to alert Ugandans and friends of Uganda about the seriousness of the degradation that was taking place in our country as a result of a corrupt system which was being perpetuated by a bankrupt leadership."³⁴

The publication contains news and commentaries about the Uganda National Resistance and its military wing, the National Resistance Army.

Generally, the NRM government must be credited with having encouraged and nurtured freedom of expression and of the press under which writings and publications works about government failures including itself have mushroomed over the years.³⁵ One such books is Kasozi's "*The Social Origins of Violence in Uganda*" which was published in 1994. Whereas Prof. Kasozi's contribution is devoted mainly to Governments' misgovernance from 1964 to 1985. other publications have appeared since then criticising and detailing the omissions, misdeeds and reversals of the NRM administration.³⁶

Thus, writing about Parliament as an instrument of democracy, Professor Grace Tumwine-Mukubwa observed in 1998:

"For the majority, the reason for not consulting is really economic. Elections in Uganda are held under what has translated itself to mean "personal money". Votes are bought and sold. Reports on the election process of 1996 other than for the President, showed that the whole exercise has been commercialised."

Consequently, some members of Parliament do not feel that they owe any duty to their constituents. Even those members who are more public spirited and would like to

33 See Mamdani M: *Contradictory class: The case of Uganda in Anyang Nyong'* (ed.): *Popular Struggles for Democracy in Africa*, Zed Press, London, 1987.

34 October, 1994.

35 In the Forward: page (i).

36 See Selected Bibliography in Kabwegyere Tarsis B. op.cit. page 190.

consult, may find themselves in a quagmire. Immediately they visit their constituencies, they find out that they are expected to perform the role of father christmas. They are met with all sorts of financial requests such as school fees for children, graduated tax, money for medicines and money for alcohol. For this reason, many members just avoid going to their constituencies for any reason.³⁷

There can be no doubt that one of the greatest disservices the NRM government has done to Uganda is to accept and encourage monetisation of and bribery in all public elections. In *Constitutional and Political History of Uganda, From 1894 to the Present*, I discussed the ghosts of the past and unholy alliances with new ones appearing since the advent of the NRM administration and observed:

“Since 1996, the NRM has unveiled many facets which few Ugandans expected from it. It can be stated that since the promulgation of the 1995 Constitution which was arguably the finest hour of the NRM administration, the leadership has appeared to concentrate more on political games of how to stay in power and exclude others from it longest.”³⁸

In his incisive article headed: Africa: The Agony of Being a Mere Buzzword, Dr Kabayo wrote:

“For a short time during the mid 1990s, it looked as if a few African countries were going to break out of this club of the destitute, with some like Ghana, Uganda, Senegal, Tanzania, Mozambique, Botswana, South Africa and others registering growth rate in excess of 5% per annum. News about this economic good fortune gave the continent hope and even fuelled talk of an ‘African renaissance’. However, the poverty assessment study of Sub-Saharan African countries financed by the World Bank, conducted later in the same year concluded that the cheerful statistics were not the beginning of a genuine economic turn around, but a mere illusion, no more than, what one journalist called a ‘result of good rains and bad accounting.’ And what is more, the experts confirmed that Africa’s poverty is increasing and deepening, in a trend that is unlikely to be reversed in the foreseeable future.”³⁹

4.2 WHAT WENT WRONG?

The priorities which inspired African nationalists and liberators to fight for freedom and against repression and injustice altered. The highest preferred by the new African leaders came to be how to stay in power longest for the sake of self. The obvious urge to ensure the security of the state turned into the love of power and the protection of the nation changed into the protection of the leader and his or her immediate supporters even if this could only be achieved at the expense of the

37 See Hansen, H.B and Twaddle M. (eds.) *From Chaos to Order: The politics of Constitutional Making in Uganda*, Fountain Publishers, Kampala, 1994.

38 In Oloka-Onyango J.ed. *Constitutionalism in Africa*, Fountain Publishers, Kampala, 2001.

39 Kabayo, e-mail: jkabayo@hotmail.com.

former priorities such as eradication of disease, poverty and ignorance.⁴⁰ The leader, his or her immediate family, government loyal Ministers and public servants became the most important assets of the state to be sustained and protected at all costs.

While national policies continued to be formulated and implemented on such subjects as defence, economic development and social services, the implementation tended to first favour first the privileged members of the ruling oligarchy.⁴¹ The social and economic analysis of the *personalised state* began to reveal interesting phenomena. The major beneficiaries of the few economic gains achieved tended to be the leaders and their immediate supporters. The new priorities effectively alienated the middle and industrious classes of the nation who were enlightened to know the meaning and effect of the new emphasis. The leaders were forced to turn to the poor and the peasants who knew next to nothing and who could, on being bribed with a few coins and big but empty promises, do whatever the leaders wished, including voting massively in support of the leader's wishes however whimsical.⁴² It increasingly became obvious that without the poor and the ignorance of the state being duped into becoming the vehicles to and instruments of power, the metamorphosed leaders would have starved to death and certainly lost office long time ago. The new leadership of Africa thus chose to survive longest by riding on the backs of the poor and the ignorant. Those who questioned the new priorities were threatened with the unleashing of the Military forces against them.⁴³

The modern leaders also realised much earlier in the last century that in order for them to survive and prosper personally, they needed to accept the dependence syndrome. The countries they led became client states of the foreign wealthy individuals, corporations and donor states. Being able to thrive on the sweat and blood of foreigners through aid and loans, the new African leadership no longer got inspiration to advocate the right of self-determination which was so popularly utilised during the struggle against colonial rule.⁴⁴ Instead, these leaders travelled expensively far and wide to foreign capitals with begging cups seeking handouts and other assistance from the rich.⁴⁵ National assets and corporations and utilities

40 See Kanyeihamba G.W. Constitutional and Political History of Uganda, op.cit. page 275.

41 Global Fund for Development: Commission of Inquiry Report.

42 Nabudere Dani W: *The challenge of creating sustainable Peace and Democratic Freedom in Uganda*, in E.A.J.P and H.R., Volume 2 number 2, 1995, page 131.

43 The Daily Nation: Nairobi, 8 March 2006.

44 See Ngũgĩ Wa Thiong'o: *Decolonising the Mind: The politics of language in Africa Literature* 86 (1986).

45 See the Monitor 6 June 2002.

were staked out and alienated to foreign international bidders, not always the highest, depending on what kickbacks the leaders' negotiators were able to receive from the potential new owners. In their zeal to industrialise, parcels of land were meted out, and invasions of the environment freely permitted without regard to the needs of ecology and future generations.

The greed and ambitions of the persons closest to the leadership knew no bounds. In order to get rich quickly without working, the economic disease of corruption came to be accepted as normal.⁴⁶ In some instances, it was harnessed as a legitimate tool for retaining political power. The freedom fighters and the liberators who had come to power with such promises and hope for the masses easily abandoned their original missions in preference to personal comfort and wealth. Thus, in Uganda, the NRM abandoned two of its major policies which had endeared it to the population. These were the Ten-Point Programme and the idea of electing or appointing leaders on merit. The idea of fighting vigorously against corruption was abandoned in preference to the retention of political power.⁴⁷ Another principle which was abandoned by the NRM was the concept that the government of Uganda should be broadcasted and non-sectarian.⁴⁸

It is nowadays commonly whispered that the NRM leadership is riddled with blatant ethnicism, nepotism and personal patronage and that employment and appointment in public service depends on one's loyalty to the NRM leadership and not to the nation of Uganda.⁴⁹

The NRM High Command accused previous Presidents including President Godfrey Binaisa of meddling in commercial and trade transactions instead of leaving them to line ministries. Available evidence shows that the present NRM leadership cannot be acquitted of a similar charge.⁵⁰ The NRM leadership is accused of having abandoned its socialist, nationalistic and popular policies in preference for ultra capitalist economic ones in which the NRM top leaders or those closest to them benefit personally. The leadership stands accused of having allowed the economy to develop in such a way as to leave the peasants still acutely poor or poorer still while those in its inner circle, their friends and foreign

46 Tusasirwe Benson, *op.cit.* page 70

47 Ten Point Programme.see Paul Arthur Kamwanga's letter in *New Vision*, 13 June 2006.

48 Mr Amos Nzeyi, a supporter of the NRM in an interview with the author, Uganda Golf Club, on 8 March 2006.

49 See Mutibwa P. *Uganda since Independence: A study of Unfulfilled Hopes*, Fountain Publishers, Kampala, 1992.

50 Interview with Mr Francis Tumuhairwe formerly of the Ministry of Finance on 9 March 2006. Also see the attempted sales of the National Dairy Corporation and Kinyara Sugar Corporation, minutes on both in Ministry of finance, Kampala.

associates have harvested the greatest rewards from the wealth of Uganda. It is one of the bitterest ironies of the NRM philosophies that every five years or so, the same leadership with alleged coercion and bribery, corruptly uses the same poor, the ignorant and the peasants to be sustained in power.⁵¹

It is therefore not surprising that in the labyrinth of governance, executive power can be used to enhance and direct development. Conversely, executive power can be used to create such undesirable conditions that an enlightened population perceives them as intended not only to disadvantage but to frighten it as well.⁵² It was observed that in the 2006 elections, the majority of Ugandans yearned for change and could have easily voted overwhelmingly for an opposition candidate, but the majority of them also feared for their lives if the NRM leadership were not to be returned to power. Caution prevailed over valour and most of the NRM leaders were returned to Parliament in those elections although in the process some 80 NRM cadres were defeated by multipartists and independents.⁵³

It is not often appreciated that failure or neglect to exercise executive power can be as harmful as abusing it.⁵⁴

We have already alluded to the weak or lukewarm attempts of the appropriate authorities in government to respond effectively to allegations of corruption and abuse of office in public affairs.⁵⁵

From time to time, the Press have investigated, discovered and reported several or more holders of public offices who have indulged in corrupt practices or who have the mentality of “*get rich quick*” and do so or, who are connected with shoddy or corrupt schemes and organizations, the acts and behaviour of which are contrary to the leadership code.⁵⁶ Many such reports are often ignored by those concerned and, those which are acted upon yield very few positive results. Society can no longer tolerate a situation where holders of public office who are supposed to act impartially and justly in the public interest have enjoined that interest to one of theirs, their family or friends to the extent that the two have become inseparable.

51 See Dr Kizza Besigye: Presidential Candidate's manifesto for the 2006 elections.

52 The Monitor, 9 March 2006.

53 *Secret ballot v Third Term*: Article in the Monitor, 8 October 2003.

54 Daily Nation, Nairobi, 7 March 2006.

55 *Supra*.

56 The Ssebutinde Commission Report on the URA, Kampala, 2004.

The proper exercise of executive power means a radical departure from the prevailing attitudes, whether official or unofficial, which appear to condone wrong-doing and reward corruption in public administration. A radical transformation of the public service and accountability is long overdue.⁵⁷

In conclusion, I would like to observe that the courage to decide according to the country's long-term interests rather than what is expected by those to be affected by the decision, is not shared by many people. However, it is the quality, conviction and courage of the Judiciary that maintains a country in democratic constitutionalism and prevents it from slowly turning into an autocracy.

57 See Ibrahim Ssemujju: Is the 7th Parliament just a Big Balloon? Sunday Monitor, 16 March 2003.

CHAPTER FIVE

HUMAN RIGHTS: KNOW THEM, DEMAND THEM, DEFEND THEM

5.1 ENFORCEMENT OF HUMAN RIGHTS AND DEVELOPMENT

In its preamble, the African Charter on Human and People's Rights recites, in part as follows:

"Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social, and cultural rights in their conception as well as universality and the satisfaction of economic and cultural rights is a guarantee for the enjoyment of civil and political rights."¹

5.2 HUMAN AND PEOPLES' RIGHTS

From the Egypt of the pharaohs to the AU, ancient Greece to the French Revolution, the English *Magna Carta* to the American Declaration of Human Rights, and from the traditional African customs to the intricacies of constitutional instruments of independence, men and women have formulated platitudes about the rights and freedoms of human beings every where. While the concepts of human rights are embedded in the traditional theory of natural rights which every human being is supposed to enjoy by virtue of being human, the principles of peoples' rights are authenticated for the first time by the records of the African Charter of Human and Peoples' Rights. However, in between the ancient and modern, concepts, illustrations and interpretations of human rights have varied in point of time and in the context of race, ethinicalism and regionalism. The shade of every variation has similarly had its determinant in the exigencies of political judgment, social values and economic factors, which have happened to prevail almost in every successive passing generation. Whether it is the struggle to realize the rights of self help and reprisal which characterized all primitive societies or the claim for the rights of the child and of the unborn child in a more caring world, the adoption of new rights and freedoms has always been ambulatory with man's progress. Jimmy Carter, a former USA president, whose rhetoric on human rights

1 See OAU Document CM – 1149 (XXXVI) 2 (1981), Addis Ababa, Ethiopia.

76 *Kanyeihamba's Commentaries on Law, Politics and Governance*

was more pronounced than that of any other comparable modern leader, clearly recognized the changing character of human rights. In advocating a new thrust of foreign policy of his administration, he asserted:

"The best definition I know – and certainly the most succinct – is the phrase Thomas Jefferson used in the American Declaration of Independence: 'Life, Liberty and the Pursuit of Happiness. '"

Later, he conceded:

"in the modern context, most of us would understand the pursuit of happiness to include the right to a basic standard of material existence, to food, shelter, health care and education."

Contemporary literature acknowledges the existence of two definitions for the term human rights. Thus, Zsabo has observed:

"When government leaders talk about violation of human rights, some people think the main emphasis should be on economic rights, like adequate food and shelter."

For a long time, it was the civil and political rights, which were emphasized and incorporated, in the written documents as legitimate. They were the basis of the Universal Declaration of Human Rights, which was adopted in 1948. They were almost exclusively of western orientation. This is not altogether surprising.

Hitherto, the only well-publicized philosophy about human rights was that of the western civilization. Western thinkers and writers had led in the formulation of ideas and principles, which came to be adopted at the international level. The adoption of such ideas was itself not surprising either. Scholars and opinion moulders of the western world had hitherto initiated world and regional conferences to discuss the subject of human rights. Many of them had presided over and guided the deliberations of meetings adopting resolutions and conventions about human rights. The Universal Declaration bears the hallmark of this philosophy. It has been said that fundamental to the western conception of human rights is its emphasis on the liberty of the person:

"The countries of the west, with a shared historical development and a common philosophic tradition do accept the concept of individual rights against and prior to the existence of the state, It is in these countries that political and civil rights are comparatively more protected."³

As we shall see later, most non – western states, for a combination of cultural, and ideological reasons and because of policy priorities, frequently tend to place

2 In Human Rights Quarterly: The John Hopkins University Press, Volume 6 number 2 May 1984.

3 Frank Thomas M: Comparative Constitutional Process, XXXIII (1968).

emphasis on economic factors and social development. Socialist states place greater importance on and have been observed to have a better record with regard to economic rights protection than countries of western democratic societies. The difference between western and eastern blocks can be easily discerned. In western capitalistic states economic and social rights are perceived to be mainly outside the responsibility of the state. In socialist states, economic rights are viewed as fundamental responsibility of the state. While political and civil rights are perceived as essentially communal rather than individual and consequently of secondary importance. It may be that president Nyerere of Tanzania was expressing the immediate view between the western:

"I agree that in the idealist sense of the word it is better that 99 men should go free rather than one innocent man should be punished. But in the circumstances of a nation like ours, other factors may well arise in which it is better that 99 innocent should suffer temporary detention than that one possible traitor should wreck the nation. It would certainly be complete madness to let 99 men escape in order to avoid the risk of punishing one innocent person. Our ideals must guide us, not blind us."⁴

Nyerere's view is reflective of most of Africa today and contrasts sharply with the western concept of individual liberty which professor Dworkin typified by saying:

"Someone has a right when he is entitled to insist on doing something or having something done even though the general welfare of everyone else is harmed thereby."⁵

The rights reflected in the above extracts are, of course, legal rights. We are here concerned with the natural meaning of right where the holder has the liberty to do everything, which is not injurious to another. This legal definition does not coincide with the ordinary sense of the word liberty. In it's widest sense liberty includes the right to do evil. Nevertheless, it has been observed that the law takes away liberty from idiots and evil men lest they abuse it at the expense of others. Thus, in the English language, taking liberties means encroaching upon the rights of others or acting outside the boundaries of what is legally or morally permissible, and therefore infringing the kind of liberty, which the law recognizes. In this sense every law is contrary to liberty. Rights properly so - called are nothing more than creatures of positive law in the same way that natural rights are the creatures of natural law. In the context in which they are cited, Dworkin poses as a natural lawyer while Nyerere is a positivist.

The rights and freedoms, which preceded and formed the greater part of the Universal Declaration of Human Rights were those believed by the drafts men to

4 (1964) Review of Contemporary Law: II University of Dar es Salaam (1964).

5 Dworkin, Ronald: Taking Rights Seriously: 1-28 (1978).

78 *Kanyeihamba's Commentaries on Law, Politics and Governance*

be common amongst civilized nations of Europe. They were said to be attributes of humanity with which the individual was endowed. Historically, only a privileged minority within each state represented by the writers and thinkers of western societies enjoyed their rights and freedoms, often at the expense of a greater number of fellow citizens. In 1776 the Virginian Declaration of rights declared that all men by nature are equally free and independent and had inherent rights. The Virginian theme was taken up by the whole of the then independent USA when in the American Declaration of Independence it was affirmed that, It is self-evident that all men are created equal and they are endowed by their creator with certain inalienable rights among which are life, liberty and the pursuit of happiness.⁶ These idealistic and lofty pronouncements did not by themselves stop slavery or bootlegging nor the disarray of civil life at the time. A decade or so later, it was the turn of the French elite to publish solemn declarations. They proclaimed the rights of man to be natural, inalienable and sacred.⁷

Sadly, this fact did not; in anyway, significantly improve the lot of their fellow citizens. It was unable to prohibit the French guillotine and the general anarchy, which continued unabated for sometime. Of course long before these more pronounced declarations came onto the scene, the English had had their *Magna Carta* and Bill of Rights, among others, with more or less the same results.⁸

In between the world wars and especially since the Second World War, there have been periodical proclamations boldly spelling out the ideals of and the necessity for the protection of the basic rights and fundamental freedoms of the individual. While a few of these have been national and even parochial, in the main, they have tended to be international and regional. The most famous of them all was, of course, the Universal Declaration of Human Rights adopted by the United Nations. It boldly proclaimed and specified rights and freedoms which it saw as:

"A common standard of achievement for all mankind to the end that every individual and organ in society keeping the Declaration constantly in mind, shall strive by teaching and education to promote respect for the rights and freedoms and progressive measures, national and international, to secure their universal and effective recognition and observance."⁹

6 Corwin, Edwards: The Higher Law: Background to the American Constitutional Law, 1967.

7 See: Bhagwan Vishnool and Bhushan, (eds.) World Constitutions, 7 ed: The Constitution of France, 1-9 Sterling Publishers private Limited, 1999 Reprint.

8 See: Wilson Geoffrey: Cases and Materials on constitutional and Administrative Law, 2 ed., CUP Cambridge page 338.

9 Adopted in 1948.

But even at this late stage of their development, the concepts of international human rights owe their refinement to the legal and political thoughts of the 17th and 18th centuries England, USA, and France. The landmarks in the field of human rights included, in England, the petition of rights, 1627, the Bill of rights 1688, the Habeas Corpus Act, 1879, in America, the American Bill of Rights, 1791, and in France, the declaration of the rights of man and citizen 1789.

In Europe these were times of dramatic changes in which political, economic and social values were reassessed in the context of the fabric of society and the body politic. The freedom fighters who symbolized the emancipated industrial class which was vigorously demanding political freedom and participation.¹⁰ In the USA, the new world encouraged demands for a new spirit of freedom and individual enterprise and a new social order. In all, feudal structures were disintegrating under pressure generated by the industrial revolution.

Capitalism with its attendant activities of urbanization and industrialization was proving to be a dynamic transformational force of the era. Concomitant with this transformation was the rise of a new industrial middle class. It demanded political rights and access to the political arena.¹¹

It may be argued that the concept of the international development right was implied by the resolution of the ILO as long ago 1944 when it said:

"All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual freedom and dignity in conditions of economic security and equal opportunity."¹²

Nonetheless, this formulation is vague and does not carry the reader any further in the search for the meaning of development.

However, this much can be said. The central purpose of development is the realization of the potentialities of the human person in harmony with the community. The human person is the subject and not the object of the right to development. Both material and non-material needs must be satisfied. Respect for human rights is fundamental. Opportunity for full participation in development must be accorded to the individual. The principles of equality, and non-discrimination must be respected and lastly a degree of individual and collective self-reliance must be achieved. In so far as none of these have been fully

10 See: Mills, *CW Power Elite*, 1956.

11 See: Griffith, *JAG Public Law*, 1978, Stevens and Sons Ltd, London page 392.

12 *Ibid.*

80 *Kanyeihamba's Commentaries on Law, Politics and Governance*

acknowledged, let alone implemented in Africa, Africa has not yet witnessed or experienced the international right to development.

Historically, it was not until 1972 that the right to development surfaced at the international level in its form. In that year the Chief Justice of Senegal, later to become the president of the international Court of Justice, entitled his inaugural lecture to the study session of the International Institute of Human Rights in Strasburg, "The Right to Development as a Human Right." This was Keba Mbaye, a product of the French colonial and cultural history. He delivered his paper in French under the name:

"Le droit au development un droit de L' homme."

It was about the same time that the director of the same institute, Karl Vasal launched his theory that a third generation of human rights had evolved. Both Mbaye and Vasal subsequently played important roles in securing the adoption of a resolution by the Commission on Human Rights in 1977 calling for a study on the international dimensions of existence of the right to development. After a series of further considerations- the UN General assembly 'consummated' the process by adopting in 1979 Resolution 34/4b in which it emphasized:

"That the right to development is as much a prerogative of nations as of individuals within nations."¹³

At a conference held under the auspices of the International Court of Justice at the Haque in 1981 on the subject of "Development, Human Rights and the Rule of Law" there was a prolonged discussion about the term "the right to development."¹⁴

Ultimately, it was agreed that development, should be understood as a process designed progressively to create conditions in which every person can enjoy, exercise and utilize, all his human rights, whether economic, social, cultural, civil or political. The conference concluded that every person has the right to participate in and benefit from development in the sense of a progressive improvement in the standard and quality of life.

The prevailing theme of development in Africa has remained change, change of political institutions, change of economic structures, change of educational structures, change of history and ultimately, change of social values. Once we begin to talk about change we are immediately faced with searching questions. What is to be changed and why? How is change to be effected and by what means? What are

13 See: Mbaye Keba: *Les broits de L' Homme et Afrique* 174, Pedone Paris, ed. 1992.

14 See: UN Doc E/CN4/SR. 130, 131, 216-218.

the goals of change? What are the consequences of change? What motivates the people who are responsible for change? Lastly, what benefits, if any, accrue to the community for which change is planned?

In theory, these questions can be and have been answered in a satisfactory manner. In practical terms the answers are more difficult to evaluate because evaluation depends upon a number of imponderable factors which include the feasibility of policies, the availability of both resources and the means of development as well as compatibility not only with traditional values but also with the prevailing political, economic and social conditions of the particular society experiencing the change.

There have been some tentative suggestions intended to underscore these changes in Africa. At the official level, there are ideological and nationalistic policies, which are clearly manifested in documents such as five-year development plans, national plans, charters and declarations. These documents, often radically different and with diversified intentions, are indicative of the government commitment to a rational transformation of African societies from the *status quo* to something different and hopefully better. The envisaged changes are supposed to emerge from careful planning and formulation of policies designed to accord with local environment and the demographic character and resources of the country. It is this kind of ordered and evolutionary change that is likely to be in accord with human rights and which is likely to be achieved without much interference with the peoples' liberties. However, a study of Africa's development problems, the analysis of its political instability and a realization of impatience on the part of the inhabitants all tend to show that the changes are likely to be more revolutionary than evolutionary. Consequently, the trends and fashions in development will most probably lead to abrupt breaks with the past. Governmental institutions have been and will continue to be overhauled within the foreseeable future. Some of the projected policies, if implemented, are bound to lead to a shake up of the social order of most African states.

Indeed, already there have been a number of political social upheavals, following implementation of radical policies almost in most of Africa.¹⁵

Some people have argued that the only possible means capable of transforming the African societies in a peaceful manner are those originating from and implemented by the Africans themselves. This is regarded as the ideal situation when local circumstances, talents and finance are predominant in the planning and

15 See: Harris David J: The Protection of Economic and social Rights in Common Law Countries in the implementation of Economic and Social Rights.

82 *Kanyeihamba's Commentaries on Law, Politics and Governance*

development of society. This is a concept that may be equated with the right to self-determination and the idea of self-help and reliance. However, two contrary views may be advanced. In the first place, regardless of whoever is responsible for change, there will always be pockets of resistance to policies whether as a result of traditionalism, vested interests or simply human nature that tends to be impervious to change. In the second place, there is the realization that the problems of development are pretty universal and must be examined in the context of the globe. Prevailing attitudes and needs may have to be seen at both national and international levels. The successes and failures observed elsewhere may lead to an appraisal of the situation at the national and even local level. Modern supranational institutions and organizations and interstate dependence have meant that a country may have to look beyond its own territory to find solutions to its domestic problems. Nationalism must give way to international expertise and knowledge. The question that may arise is whether international expertise and knowledge are always compatible with what Africa conceives to be the relationship between development and human rights.¹⁶

5.3 THE IMPACT OF FOREIGN AID

Recent studies in development have revealed acute shortage in funds, materials and personnel in Africa. Development plans continue to assume a high percentage of reliance on foreign aid, experts and foreign materials.¹⁷

A considerable number of personnel engaged in development projects in Africa tend to be foreign experts loaned for the purpose through either bilateral aid agreements with foreign governments or through the United National Specialised Agencies or organizations such as the IMF and the World Bank.

Often, these experts come for short-term periods of operations but invariably make recommendations whose consequences are far reaching. Few of them have had sufficient knowledge of the background to governmental or national ethos. In some instances, the schemes they sell to local bureaucrats are likely to be replicas of plans existing in their own home countries or those they have sold elsewhere or indeed, of theoretical ideas of their own imagination which have not been tried elsewhere. The fact that they are expatriates should not, by itself be a reason for criticism. In some cases, the advice and participation of the expatriate specialists

16 See: Asbjorn Eide: Realization of Social and Economic Rights and the Minimum Threshold Approach: in 10 H.R.L.J. 38 (1989).

17 The role of University in an underdeveloped country, Mawazo, Volume 2 number 1 page 29. Makerere, U.P. Kampaa, 1972.

have been valuable to development. The criticism is that they stay for a short time studying the conditions of the host countries while making far reaching proposals for development. Sometimes their presence tends to retard local talents for inventions and innovations.¹⁸

There are worse situations when the aid programmes are intended to further political or military strategic interests of the donor countries. It has been said that the drive to independence was essentially a movement for political emancipation. It did not change economic relations, which means that the African countries may be politically sovereign but they remain economic dependencies.¹⁹

Writing about Aid to Africa, Arnold has stated that aid is now big business. Every year a mass of statistics is published to demonstrate the quantity and kind of flows taking place. "*All too frequently, however,*" adds Arnold, the relevant questions about development are not raised." Those interested in doing so have been so swamped with facts and figures that they do not see what is happening in reality. Ultimately, the most important issue is not how much or little aid is given but how it is used and what are its consequences.

One of the aims of modern bilateral aid programmes is to ensure that the economies of the receiving countries are closely tied to those of donor countries, and while this may be good for the donors, it is not always proven that it is good for the receiving state. It has been observed that:

"Aid has facilitated a continuing and growing "presence" in Africa by the old colonial power and this acts as a lubricant for neocolonialism."²⁰

This neo-colonialism is founded on a myth. This myth is that a western style of modernization which is based on a high-accumulated capital will stabilize these countries and plant and nurture the seeds of capitalist democracy. Unfortunately, this is a modernization which is founded on the most up-to-date technology, utilizing less and less labor while depending on more and more consumer goods and the consumption of fossil fuels which are resources that are scarce in the subject countries:

"Today, to produce a calorie of food, an American farmer consumes a hundred times more calories of petroleum than say an Indian peasant farmer."²¹

18 Sellitz C. and others (eds.) *Research Methods in social Relations*, 1971 Reprint: London Methuen and Company Limited, page 4.

19 Allott Anthony: *Legal Development and Economic Growth in Africa*: Kogan page, London, 1979 page 16.

20 Arnold Guy: *Aid in Africa*: Kogan page, London, 1979 page 16.

84 *Kanyeihamba's Commentaries on Law, Politics and Governance*

Because of the imbalance in cost and benefits of modernization modeled on the west, many developing countries have become so indebted to donors that loans have by far outstripped the annual national income. This indebtedness has led to the birth of client states whose governments exist for the benefit of the donors and not of the masses of the populations within those states.

The result is that the massive injection of capital in these developing countries benefits only a fraction of the population.

Increasingly, the donor countries rely on that small section of the population, which they see as the true protector of their vested interests. In reality, it is the client, government and the invested interests in the developing countries, which are a source of instability because they are not representative of the interests of the majority of their population.²²

In retrospect, the long-term interests of both the donor and developing countries would seem to call for reversal of the policies and attitudes so far discussed. If client governments were to be told that they would cease to enjoy the support of their paying masters and that of the international community if they fail to observe human rights of citizens, it is likely that they would endeavour to produce better internal policies designed for the benefit of the people as a whole.²³

Human rights are classified and their protection and enjoyment may differ in point of time and circumstances. In any event, these rights and freedoms have evolved at different periods of human history and development. Moreover, not all internationally recognized human rights and especially several economic and social rights are capable of immediate satisfaction. Jack Donnelley (1982) has enumerated conditions, which make it impossible to realize and implement all human rights and freedoms. It may be because of political impossibility. The state may be unable to fulfill the obligations of certain rights because to do so would threaten the existing distribution of power or wealth. It may be of concentration on higher rights, values and interests and neglects of inferior ones because of the inadequacy of resources. There may be administrative, moral and political reasons, which justify non-performance in the area of certain rights and freedoms. As an example, nearly all governments in developing countries, find it physically and resourcewise impossible to provide certain rights such as jobs or social security for their citizens.

21 Crooks: RJ Planning for Developing Countries: Conference paper, British twon Planning Institute, London, Anne 1971.

22 Benham, Frederic: Economic aid to under developed countries, Oxford, OUP, 1961.

23 Hawkins: E.K: The Principles of Development Aid: Harmondsworth: Peguion Books, 1971.

However such rights figure prominently in international Instruments of rights and in state constitutions, but citizens are unable to enjoy them even given the best efforts of the government.²⁴

Rights are important claims, notwithstanding the intervening steps between them and their realization. Such steps may be justifiable or unjustifiable. Inevitably, the attitude towards human rights and their protection have tended to differ from generation to generation.

5.4 KNOWLEDGE AND PROTECTION OF HUMAN RIGHTS

The title of this paper is "Human Rights, Know them, Demand them, Defend them." It is not my own choice. Infact, those words constitute the motto adopted by the world conference on human rights held in Vienna, June 1993.²⁵

It has been observed that human rights are political by nature and therefore they require political will to implement and public scrutiny to maintain them. Thus, Uganda commission of inquiry into violations of human rights has observed:

"A country may have the best written Bill of Rights, but if the state organs and institutions, leaders at all levels, and every individual in the country are not committed and do not pay serious attention to them, human rights as so guaranteed are not worth the papers they are written on."²⁶

Infact, Uganda is a good example of the distinction between theoretical and actual protection of human rights. The violation of human rights in post-independence Uganda has not been solely due to the weaknesses or absence of constitutional and other legal guarantees of those rights. The independence Constitution and other legal instruments guarantee those rights. The Independence Constitution of 1962 contained an entrenched Bill of Rights, which has remained intact between then, and now notwithstanding the massive violations of human rights and the political turmoil that have punctuated Ugandans' history. It is because of this that the Uganda Constitution of 1995 has created and placed emphasis upon the Human Rights Commission and both its preventive and educational roles.²⁷ Teaching human rights was incorporated in the universal Declaration of human rights, 1948 where it is provided that:

24 Campbell Tom, et al: (ed) *Human Rights from Rhetoric to Reality*: Basil Blackwell Ltd, Oxford, 1986.

25 *Ibid.*

26 Op. city, October 1994, findings and Conclusions.

27 Articles 51-58 of the Uganda Constitution.

86 *Kanyeihamba's Commentaries on Law, Politics and Governance*

" Every individual and every organ of society shall strive by teaching and education, to promote respect for human rights and freedom by progressive measures, national and international to secure their universal and effective recognition and observance."²⁸

The Uganda commission of Inquiry into violation of human rights alluded to earlier, further recommended that

"human rights education would have to be extended to the entire population of adults and young people alike, and to that end, it should be incorporated in all educational syllabi in schools and institutions, including those for the armed and security forces."²⁹

This recommendation was fully accepted and incorporated in the 1995 Constitution. Education and knowledge about human rights monitoring is essential to their realization. Every state must allow an independent authority to enquire into how that state and its agencies are implementing its own human rights legislation or regional and international instruments to which it is a party. Of course, the idea of monitoring has never been popular with most governments of the world. In relation to the Uganda Constitution some writers, notably Furiey and Katalikawe have observed, quite rightly, in my opinion, that the constitution provisions for human rights monitoring do not go far enough. They point out that whereas the powers of the Commissions of Human Rights of investigations and enforcement are quite extensive and compare favorably with the powers of courts of law, when it comes to monitoring, the provisions are, to say the least, vague.³⁰

Infact, what is provided in the Constitution is that the human rights commission will monitor the Governments' compliance with international treaty and convention obligations on human rights to which Uganda is a signatory party but when it comes to the governments compliance or non-compliance Article 50 of the constitution provides, *interalia* that any person who claims that a fundamental or other right or freedom guaranteed under the constitution has been infringed or threatened is entitled to apply to a competent court for redress which may include compensation. Any person or organization may bring an with the rights and freedoms entrenched by Uganda itself, the Constitution is conspicuously silent.³¹ The only indirect reference to such monitoring are the general provisions that the Constitution is the supreme law of the land and that its provisions together with Chapter 4 which incorporates Uganda's own Bill of Rights are binding on every one including the government. Furiey and Katalikawe are doubtful as to whether

28 *Ibid.*

29 Appendix 7.

30 Katalikawe James.

31 Katalikawe, op. cit.

government policies or non-policies of human rights are similarly covered. To discover the truth about this matter it may be necessary for one to examine the whole Constitution including the National objectives and principles of State Policy.³²

There can be no doubt that a key issue in the perpetuation of the cycle of violations in this region is ignorance of human rights on the part of both the state law enforcement officers and the actual and potential victims of violations of human rights. The powers and functions entrusted with the Uganda Commission of Human Rights are adequate and extensive. The Commission is empowered to:

- (a) Establish a continuing programme of research, education and information to enhance respect of human rights.
- (b) Recommend to Parliament effective measures to promote human rights including compensation to victims of human rights or their families.
- (c) Create and sustain within society the awareness of the provisions of the Constitution as the fundamental law of the people of Uganda.
- (d) Educate and encourage the public to defend the Constitution at all times against all forms of abuse and violation and³³
- (e) Formulate, implement and oversee programmes intended to inculcate in the citizens of Uganda awareness of their civil responsibilities and an appreciation of their rights and obligations as free people.³⁴

Article 50 of the Constitution provide, *inter alia* that any person who claims that a fundamental or other right or freedom guaranteed under the constitution has been infringed or threatened is entitled to apply to a competent court for redress which may include compensation. Any person or organization may bring an action against the violation of another persons or group's human rights.

Article 126 provides that judicial power is derived from the people and shall be exercised by the courts in the name of the people and in conformity with the laws and with the values, norms and aspirations of the people. In adjudicating cases of both civil and criminal nature, the courts shall be subject to the law, apply certain principles including the notions that justice shall be done to all irrespective of their social or economic status, justice shall not be delayed, adequate compensation shall be awarded to victims of wrongs and substantive justice shall be administered without undue regard to technicalities. Article 128 provides that in the exercise of judicial power, the courts shall be independent and shall not be subject to the

32 Furly and Katalikawe op.cit. *ibid*.

33 Op. cit. recommendations.

34 This exercise has been severely handicapped by lack of adequate funding.

88 *Kanyeihamba's Commentaries on Law, Politics and Governance*

control or direction of any person or authority. Procedure for dealings with interpretation of constitutional provisions including those, which prescribe rights and freedoms, are to be found set out clearly in Article 137 of the Constitution. State acts and decisions must not derogate from the provisions of the Constitution and even in grave emergency periods, Parliament itself has no power to derogate from absolute rights protected in Article 44 of the constitution. These are freedom from torture, cruel, inhuman and degrading treatment or punishment, freedom from slavery or servitude, the right to a fair hearing and the right to an order of *habeas corpus*.

Article 23 prescribes the circumstances and conditions under which life and liberty may be deprived or affected. Otherwise every person has rights to life and personal liberty. In cases where deprivation or restriction is permitted by law, there are strict rules of procedure and protection to be observed including the right to legal representation.³⁵

In East Africa, not all these laws or rights and freedoms, which have been enumerated, are always recognized, demanded or defended. Let me conclude with a very clear warning from the Uganda Commission of Inquiry into the violations of Human Rights. The Commission observed:

" The assumption that those who do not oppose are safe, or those who have offended the regime or who belong to the wrong ethnic groups were wanted by the regime, have proved disastrous, especially during Amins regime and the years of insurgency in 1981-1985." ³⁶

The commission noted that it was common practice for one or two intelligence officers of the state research centre or other agency to arrest someone amongst a large crowd of people, bundle him into a car boot, carry him away and proceed to kill or make him disappear never to be seen again. Whenever such incidents happened persons not affected felt or thought that they themselves were innocent and safe. The truth is that they were never safe. Often, it was they who were in line to be picked up next and face the same fate. If only they had known how to vigorously defend their human rights, it is possible that the violent and bloody history of Uganda might very well have been different. To this end everyone, each of us, is the protector and defender of the next person's rights, demand them and defend them.³⁷

35 Article 28 of the Constitution. Also see the South African case of *S. V. Smile* 1998 (5) BCLR 579.

36 Op. cit. Findings.

37 Holmes S: Precommitment and the Paradox of Democracy, IN J Elster and R Slagstad (eds.): *Constitutionalism and Democracy* (1998) 98.

CHAPTER SIX

THE RIGHT TO HEALTH WITH REFERENCE TO HIV/AIDS

6.1 DEFINITION OF THE RIGHT TO HEALTH

The preamble to the World Health Organization Constitution defines the Right to Health as “a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity.”

The definition is indicative of the indivisibility and interdependence of human rights as they relate to health. Thus, the rights relating to freedom from discrimination, information, education and participation in all activities of human endeavour are integral and indivisible parts of the achievement of the highest attainable standard of health. Equally, the enjoyment of health is inseparable from that of other human rights whether political, economic or social and cultural rights.¹

Article 12 of the International Covenant on Economic, Social and Cultural Rights obliges state parties to the Covenant to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. It outlines the steps to be taken by state parties for the achievement of the full realisation of the right to health including the prevention, treatment and control of epidemic, endemic, occupational and other diseases. The steps further oblige member states to work towards the creation of conditions which would assure to all medical service and medical attention in the event of sickness.²

It has been observed that the definition of health enshrined in the WHO Constitution has been a catalyst in helping the world community to move health thinking beyond a limited biomedical and pathology based perspectives towards the more positive domain of well being which includes the recognition of individuals and their need to realize aspirations, to satisfy needs and to change and cope with their environments.³ The constitution describes health as a social goal whose

1 *Oxford Textbook of Public Health*, (4 ed), OUP.

2 ICESCR 1976.

3 Declaration of Alma-Ata, (1978) and the Ottawa Charter for Health Promotion (1986).

realization requires the action of many social and economic sectors in addition to the health sector. The Convention proposes that the fundamental conditions and resources for health are peace, shelter, education, food, income, a stable ecosystem, sustainable resources, social justice and equity.

6.2 MISCONCEPTION ABOUT THE RIGHT TO HEALTH

Writing in the editorial of “Your Rights” a monthly magazine published by the Uganda Human Rights Commission, the editor observed that the right to health is much broader than is generally known. The editor proceeds to describe what is generally perceived as the right to health in this way:

“Every time the right to health is mentioned what comes to mind immediately is sickness, medicine, treatment, doctor, nurse, hospital, clinic, etc. This, though true, presents a narrow perspective of the right to health ... The right to health is not only about sickness and treatment but represents several social and economic conditions which are essential for the physical, mental and social development of the population ... The health status of any person depends on his/her living standards including nutrition, housing, water supply, personal hygiene, lifestyle, life skills and environment. This is why the fulfilment of the right to health involves prevention and control, health promotion and environmental protection in addition to curative and nursing care. Primary health care is therefore essential for the enjoyment of health rights.”⁴

A study referred to in the same publication noted two categories of health rights, namely those which are most respected in general and those which are most neglected or abused. Among the former, the study listed the following:

- (a) the right to privacy
- (b) the right to confidentiality
- (c) the right to informal consent
- (d) the right to equal treatment or non-discrimination and
- (e) the right to immunization, especially in respect of children.

Of the rights neglected or most abused, the study listed:

- (a) the right to access to drugs
- (b) the right to food including drinking clean water
- (c) the right to dignity of person
- (d) the right to prompt treatment with or without pay
- (e) the right to treatment in emergency situations and

4 Volume 11 number 8 September 2000.

- (f) the right to optimal care or holistic treatment.

In spite of the latter observation by the research team, their conclusion was positive. They nevertheless observed that while the Uganda Government health policy promotes and protects the rights of patients, religious-based health facilities are more inclined to the protection of those rights than public facilities.⁵

The right to health is recognized in national and international documents and treaties. The Alma-Ata Declaration which strongly reformed the principle that health is a fundamental human right had already been cited. The conceptualization of health as a right is further manifested in several international instruments.⁶

In addition to the rights related to health already mentioned, the study included the following: the right to informed consent, right to self-determination, right to assistive devices, right to pre and post-natal services for women and the right to quick access to a health unit.

The ICESCR describes health as a social goal whose realization requires the action of many social and economic sectors in addition to the health sector. WHO proposes that the fundamental conditions and resources for health are peace, shelter, education, food, income, a stable ecosystem, sustainable resources, social justice and equity. The importance of relating the right to health to other human rights can never be overemphasized. When health is understood to include physical, mental and social wellbeing, it follows that any violation or neglect of any other human right will impact adversely on health.⁷

In another research project conducted by the Uganda Human Rights Commission⁸, the researchers found that although the Uganda National Health Policy mentions “equity, ‘fair play’ and justice”, it does not expressly address the more important question of health rights. The underlying causes of this weakness include inadequate social infrastructure, poor remuneration of health workers, lack of adequate trained manpower, insecurity in some parts of the country, inadequate funding of the health sector, a non-rights-based training, ignorance and corruption.

The right to health is recognized in other regional and international instruments such as the European Social Charter, the International Covenant on Economic, Social and Cultural Rights, the Declaration of Alma-Ata and the AU Human and People’s Rights, Additional Protocol to the American Convention on

5 The major centres of religions in Uganda each has several hospitals and counselling facilities.

6 CESCR, Article 12, UDHR. Article 25, CEDAW. Article 12 and CRC. Article 24.

7 Sofia Rushani and Daniel Tarantola in Oxford Textbook of Public Health (op.cit.).

8 Publ. November 2003, Kampala.

92 *Kanyeihamba's Commentaries on Law, Politics and Governance*

Human Rights in the Area of Economic, Social and Cultural Rights and the Convention on the Rights of the Child.⁹

Lastly, the right to health imposes three levels of obligations, namely respect which means refrain from interfering or denying or limiting access to preventive, curative or palliative care, protection which means obligation to ensure equal access to facilities provided by third parties and fulfilment which means obligation to facilities, the creation of a policy of administrative, budgetary, judicial and promotional measures. Mr Nathan Byamukama answering the question "What is the right to health?" writes;

"If you told medical personnel in Mulago (Uganda) hospital or any other Ugandan hospital that you have a right to health, he/she would probably think you need psychiatric attention. Even conventional lawyers would dismiss you most likely thinking you are a confused human rights activist."

The term "right to health" is not familiar in the field of medicine or in the even national legal systems such of Uganda. However this does not mean that doctors and lawyers cannot draw inferences to what is probably meant. A doctor may think one needs medical care. He/she may also think that people are talking about medical attention to patients which to him/her is a simple ethical requirement grasped in training and he/she would gladly render (and better still if one has money). It will probably require a human rights lawyer, conversant with the current literature on human rights jurisprudence to understand what is meant by the right to health. The more familiar right in the species of basic and fundamental rights is the right to life.¹⁰

6.3 HUMAN RIGHTS AND THE HIV/AIDS EPIDEMIC IN UGANDA

6.3.1 Introduction

The Uganda Ministry of Health in collaboration with the UNICEF Uganda Country Representative has published a small booklet about Facts of Life covering knowledge and advice on such diseases and conditions as malaria, immunisation, Aids, diarrhea. Part II of the booklet covers timing of births, safe motherhood, breastfeeding, cholera, child growth, coughs and colds, hygiene and meningitis.¹¹

9 See Report of a workshop sponsored by the United Nations Children's Fund, the Aga Khan Foundation and WHO, 1986, New York.

10 UHR monthly Magazine: Volume iii number 8 November 2000, page 3.

11 A communication challenge, Volume 1, Uganda Version, Entebbe.

On Aids, the authors of the booklet reveal the facts and figures to guide the population. They state that Aids is an incurable disease which is passed on by sexual intercourse. In Uganda, about 85% of people with Aids become infected through sex. Aids can also be passed on by infected blood and by infected mothers to their unborn children. Aids is caused by HIV, a virus which damages the body's defence or immune system. People who have Aids die because the body can no longer fight off any serious illnesses. Anybody with HIV can infect others. There are no obvious signs that a person has HIV. They may look and feel perfectly normal and healthy for up to 10 years but in the duration of that time they can still pass on HIV to their sexual partners. For every person who is visibly sick with Aids, many others who appear healthy are infected with and can spread HIV. This is one reason why HIV has already spread to so many people. To complicate matters, these signs may also be present in other diseases such as alcoholism, tuberculosis and malnutrition.

Anyone who suspects that he/she may have HIV should seek advice from qualified health workers. In Uganda, it is now possible to get a test for HIV. It is best that one is counselled before the test and after receiving the results. HIV can only be passed from one person to another in a limited number of ways. The most important and obvious way is by sex between men and women. If a person has HIV, their blood and semen or vaginal fluids will contain HIV. HIV can therefore spread by sexual intercourse. It can be passed from man to woman and woman to man and between couples of the same sex. Other ways HIV can be passed on are; by use of unsterilised needles or syringes, by blood transfusion if blood has not been tested for HIV, by an infected mother to her unborn child (or breastfeeding) if the mother is infected with HIV, and by using unsterilised equipment for ear-piercing, tattooing, scarification, tooth extraction or circumcision.

On a happy note, it is not possible to get HIV from being near to or touching a person with HIV or AIDS. Hugging, shaking, coughing and sneezing will not spread it. HIV cannot be spread by mosquitoes, flies, bedbugs, lice or other insects or animals. One cannot get HIV from water, toilet seats, plates, glasses, spoons, towels or sheets.

The major prevention of HIV/AIDS is safe sex. Safe sex means being sure that neither partner is infected, remaining faithful to each other and using a condom if there is the slightest doubt. The safest sex is no sex at all or abstinence. Abstinence cannot make a person sick. After someone has been infected with HIV, it usually takes the body two to three months to make antibodies against the virus. The HIV test looks for these antibodies. The time between infection and when the antibodies can be detected is called the "window period." Some people have been

94 *Kanyeihamba's Commentaries on Law, Politics and Governance*

infected for 10 years and still do not show signs of AIDS. Other people whose defence system has been weakened by other diseases may show signs of AIDS within a year of being infected. The window period is important because a person may have HIV but the test cannot detect it. The test will show negative, yet the person will be able to infect other people with HIV. After the window period, the person will test positive for HIV. It is for this reason that it is good to get two tests for HIV. The second test should be after six months. In the meantime, the person should abstain from sex or use condoms.¹²

It is possible in a couple for one partner to test positive while the other is negative. When this occurs, it is said that the two people are discordant. Discordance is very common. In a study done in Kampala, Uganda, in 1991, about one quarter of the couples tested at the AIDS Information Centre were found to be discordant. HIV is not passed with every act of sexual intercourse, and it may take time to infect a partner. In cases of discordancy, condoms must be used. A single sexual encounter may be enough to pass HIV to an uninfected person but the risk of getting HIV through unprotected sexual intercourse increases with more partners a person has sex with or with the presence of blood during sexual intercourse, which may be due to sores, menstruation or abrasive sex or with the presence of other sexually transmitted diseases (STD) in either partner.¹³

The global summary of the HIV/AIDS pandemic of December 2004 provides a frightening and grim picture of the spread of one of the worst killers of human beings the world has ever known. There have been natural disasters including earthquakes and floods. The world has fought wars and continues to do so. Apart from earthquakes and floods which are rare freaks of nature and against which humans have no effective control, the other causes of loss of human life and suffering are preventable or curable. However, none of them have afflicted such suffering, death and fear as the scourge of HIV/AIDS which presently is unfortunately incurable.¹⁴

Despite the fact that the pandemic of HIV/AIDS was identified and has been known for some twenty five years, the ingenuity and knowhow of the human being with its scientific explorable mind have as yet to find a cure for the phenomenal killer.

12 Facts of Life, op.cit. page 35.

13 Page 43 from Facts for Life.

14 Number of people living with HIV in the World in 2004 were 39.4 million or more.

6.4 THE UGANDA OPEN POLICY EXPERIENCE

The first cases of Aids in Uganda were detected and confirmed in 1982, a year after the same had been discovered in the U.S.A. The incumbent Uganda Government of the National Resistance Movement (NRM) came to power in 1986 and immediately adopted a policy of openness, frankness and truth about what it saw and still regards as the worst epidemic to hit the country. Through other media and the Press, the government has since 1986 and continuously mounted and persisted in staging an open and public campaign about the causes, effects and prevention of HIV/AIDS problems. The epidemic is the most publicized topic that the country has ever handled. It is discussed in homes, government departments, newspapers, and other media, in churches, in schools, at public rallies and at funerals and at every opportunity.¹⁵

Since almost every Ugandan has lost relatives through the affliction of AIDS or have at least one , friends or acquaintances, infected with the virus both the publicity campaign and personal knowledge of Ugandans about it, has demystified HIV/AIDS and forced people to remain vigilant and careful about the ever present temptations that lead to its acquisition.¹⁶

Uganda's open, multi-dimensional approach to the fight against HIV/AIDS has set an unprecedented record by halting and reversing the spread of the deadly virus. The success story of Uganda has become synonymous with the global struggle against HIV/AIDS.

In 1986, the Uganda government courageously started what it saw as an imperative frankness to inform its population and the whole world that it had a serious problem of Aids. It informed and consulted with the World Health Organization (WHO) and sought international expert advice and assistance. The government invested heavily in the training of doctors, nurses and other personnel with specialization in HIV/AIDS and its consequences.¹⁷ Nearly twenty years later now, the experiment has yielded remarkable and gratifying results. Uganda is reported to be the only country in which the rate of infection in the general population has steadily and dramatically decreased from over some 37% of the population at the disease's worst period to still unacceptable but manageable rate of below 05%. By its open policy coupled with the determination to face the problem of HIV/AIDS head on, even at the expense of losing the much needed business of tourism, the Uganda Government exhibited a high level of responsibility and

15 New Vision Newspaper, Uganda, 25 May 2005 page 8.

16 The Monitor Newspaper, Uganda, 25 May 2005.

17 Twenty years of HIV/AIDS in the World: Uganda Aids Commission Secretariat, June 2001.

96 *Kanyeihamba's Commentaries on Law, Politics and Governance*

commitment to its citizens. The Uganda Government's stand has not only been applauded and welcomed by international bodies and world leaders, but its policy and practices are quickly being adopted by other nations. International HIV/AIDS experts, scholars and researchers look up to Uganda and recommend to other nations and organisations Uganda's courage and determination in the fight against the virus.¹⁸

It would be erroneous to conclude from the above observation that Uganda is now in the clear. Far from it, the country is still grappling with the same problem. It still has pockets of resistance even amongst its largely knowledgeable population, but the problem would by now have been much worse, if the Government and the people of Uganda had not taken that courageous stand. In 2003, some 78,000 adults and children died of Aids while another 530,000 are estimated to be infected with HIV/AIDS. In 2000, the number of adults and children infected with HIV/AIDS had been 820,000 or 8.30% of the population.¹⁹

Information on HIV prevalent among antenatal clinic patients has been available in Uganda since the mid 1980s. In the capital city, Kampala, HIV prevalence among the women who attended antenatal clinics increased from 11% in 1985 to 31% in 1990. By 1993 however, the prevalence had declined to 14% in women then attending the same clinics. In 1992, prevalence in men who attended clinics for sexually transmitted diseases (STD) tests was that some 46% were infected with HIV. By 1998, the prevalence had reduced to 30% and today it is said to be less than 9%.²⁰

Unfortunately, amongst the army personnel who visit STD clinics in Kampala, the story is not an encouraging one. Whereas amongst them, the prevalence was 16% in 1992, in 1996 it had arisen to 27%. Separate figures for soldiers for 2000 – 2005, were not made available by the time this paper came to be written. However, in an interview with this writer, a military doctor disclosed that the rate of reduction in infection is fairly higher compared to that obtained in the civil population.²¹

Be that as it may and remarkable as it may seem, the oldest profession of prostitution continues to flourish in the urban centres of Uganda and especially in

18 S. Gruskin, A. Wakhweya: A Human Rights Perspective on HIV/AIDS in Sub-Saharan Africa in M.Laga, etc. (eds) AIDS in Africa, 2nd ed. Rapid Science Publisher, London, 1997.

19 UHRC. Op.cit. 6th Annual Report, 2003.

20 Rosemary Kindyomunda Mwesigwa K: HIV/AIDS and Human Rights: Perspectives of a Developing Country ravaged by the Epidemic: Uganda Aids Commission, Kampala, 2001.

21 General Military Training School, Jinja, May, 2005.

Kampala. The hostesses of the profession appear to attract all sorts of clients including visiting expatriates.²² However, it would seem that this may not have increased the risks because of the Uganda government's public instructions and publicity about the use of protective measures and especially condoms.

There have been other pockets of resistance in the fight against the HIV/AIDS virus. Customs which encourage men to insist on having unprotected sex with their healthy wives even when those men have tested positive or are clear cases of AIDS victims, do not help the fight to proceed smoothly. While Minister of Justice and Attorney General, this writer proposed and introduced a bill in the Uganda Parliament to criminalize marital rape but the bill was heavily defeated in the then Parliament with the majority members boasting that no law should ever deny a man his conjugal rights. All the women members supported the bill but alas because of their small number in Parliament, they were unable to defeat the men.²³

The teaching and views of some religious leaders in Uganda do not assist those fighting the scourge of HIV/AIDS especially amongst the poor of the country whose ignorance and lack of facilities and knowledge exacerbate the situation. In an article entitled "How Culture Has Set Back The Fight Against HIV/AIDS In Uganda", Isaac Bakayana of the Uganda Human Rights Commission wrote:

"Since the discovery of HIV/AIDS in Uganda in 1982, there has been a positive movement from outright denial, to claims of witchcraft and finally to an open and endless effort to fight the disease. With the decline in the prevalence rates from 18% in 1992 to the current 6.5%, Uganda has become a shining 'star' to the rest of Africa and the world as a whole ... It is important that on top of the ABC approach, Uganda government addresses some aspects of culture because they partially contribute to making especially women vulnerable to HIV infection and to the continued spread of the disease. Women culturally enjoy little or no bargaining power for safe sex. Therefore there is need to counter such cultures due to their devastating effect."²⁴

The UNAIDS publication on Aids in Africa, Country by Country contains interesting statistics in all the countries of Africa. Generally speaking, the HIV/AIDS situation is much worse in Southern Africa and less alarming in North and West Africa while the war against it appears most encouraging in Eastern Africa. On the other hand, it is quite alarming to see that almost in every country, the number and rate of infection amongst females are much higher than those

22 UHRC, 6th Annual Report, 2003. Clergy and priests are not careful either. See Kenya Daily Nation, 22 June 2005, headline.

23 Proceedings of Parliament, Hansard, 1990-1991.

24 HRC monthly magazine Volume viii number 1, page 9.

observed in males.²⁵ This has been explained partly on what Isaac Bakayana has called culture and partly on the fact that women are the most significant group marginalized in the world.²⁶ Hand in hand with its open policy on the HIV/AIDS, Uganda has, since 1986 endeavoured to strengthen the rights of and empower women to fight and fend for themselves. The Uganda Constitution which was enacted and promulgated in 1995 provides that the state shall provide facilities and opportunities to enhance the welfare of women. The government is to implement the provisions of the Constitution by affirmative action and by creating a Commission for Equal Opportunity for women and other marginalised groups. Whereas the Government has effected some affirmative actions in the fields of representation and public appointments, it is ten years since the Constitution came into force and as yet no commission of Equal Opportunity has been established. Uganda is a signatory to international Conventions and Treaties for the empowerment and protection of rights of women. However, not all the proposals contained in those instruments have been fully utilized or implemented.²⁷

Regrettably, progressive and effective realisation of women's equal status and human rights has continued to be hampered by the cultural bondage of women. Amongst those cultural impediments, may be mentioned, marital marginalization of the female spouse, polygamy, wife inheritance and customary succession generally as well as the rights of ownership of land. Much of Africa from North to South, East to West, retains or tolerates many customs and habits which impinge on women's rights and retard their progress to equality with men.

The situation has been exacerbated by the teachings and opposition to certain women's rights by some religious leaders. Thus, in Uganda, certain leaders of the Muslim faith have vehemently opposed the Domestic Relations Bill which is intended to implement the constitutional provisions regarding equality²⁸ of men and women before, during and after marriage. The Muslim opponents of the bill are especially angry that the bill proposed to do away with their right to marry up to four wives which is not the purpose of the bill at all.

The Government of Uganda has rightly emphasized that the last line of defence in the fight against HIV/AIDS is the use of condoms. Those who cannot abstain, or be faithful to their partners should use correctly condoms. Surprisingly, this

25 See AIDS in Africa Country by Country; Economic Commission for Africa, UNAIDS, Geneva, October 2000.

26 *Ibid.*

27 Uganda Law Reform Commission, Publication number 1, 2000 Chapter 4.

28 Discussed in the Uganda HRC Magazine by Isaac Bakayana, at page 9.

sensible policy has come under attack from some religious leaders especially of the Catholic Church who regard it as immoral and against Christian teaching. One writer has remarked:

“These (religious) leaders have reminded us all that religion has no place for fornication and adultery. They have argued for abstinence till marriage and faithfulness once in marriage. The argument has continued that to encourage condom use is to encourage promiscuity and since condoms are only 95% safe, use should be discouraged. These arguments seem not to take into consideration that the most infected age group is between 15 –24 years of age. This should demonstrate that the youth have not and will not abstain. Therefore, condom use should be promoted as another option and opportunities in terms of information and accessibility equalized for their correct use.”²⁹

The prevalence of HIV/AIDS in Uganda has resulted in the training and specialisation of doctors who were previously general practitioners becoming experts in the diagnosis and treatment of the virus because of the many of their patients infected with it who have no means or opportunities to see specialists in referral hospitals. Similarly, nurses and staff in upcountry hospitals and health clinics are much more knowledgeable and practical when seeing and treating patients infected with the HIV/AIDS virus. This author had the privilege of visiting and observing the activities of a small clinic in the small town of Kabale in Western Uganda. The private clinic belongs to Dr Biryabarema and his wife and several trained personnel are nurses at the same clinic supporting the doctor. The clinic has beds for inpatients and several of those beds are reserved for patients identified to be Aids victims. The doctor’s findings which he believes reflect what is happening in the rest of the country are as follows:

When the HIV/AIDS epidemic broke out in the 1980s and early 1990s, those infected in Kabale were in the region of 35% with the young aged between 15 and 25 years infected and dying at the rate of 45% or more. Then in the subsequent years, most of those infected and their children who had been born with the virus died, one by one. In the end, the children of the deceased parents who had been lucky not to be infected with the disease, their siblings and age mates became scared stiff and lived careful lives of protection and abstinence and safe sex. According to Dr Biryabarema, today and as a result of what happened to their parents and infant siblings, some 85% of the youth between the ages of 15 –25 are virgins while the rest, may be another 13% have had safe sex or used condoms regularly that only about 02% have detected positive.³⁰ The rest of the infected people in the area are from the earliest generations who have survived longest as a result of counselling and use of modern drugs. It can be said that these are very encouraging results which are the consequences of the open and commendable policies of the Government of Uganda in its war against HIV/AIDS.³¹

29 Isaac Bakayana, *op.cit.* page 11.

30 Kabale Medical Clinic, Mbarara Road, Kabale, Uganda; interview held 7 August 2005.

31 Monitor Newspaper: 20 April 2004.

6.5 LIVING WITH HIV/AIDS

The heading “Living with HIV/AIDS” which is used here has been borrowed from a Uganda Media/TV programme in which persons who have been diagnosed with HIV/AIDS are invited and asked publicly and without hiding their identities to describe their lifestyle and how they came to be infected, diagnosed and their present state of health, treatment and new approaches to life. The programme which is popular with viewers and listeners has had a tremendous impact on the way the population regards the subject of HIV/AIDS and its victims. The disease has been demystified and its victims are seen as descent ordinary men and women who have had the misfortune of being infected with the disease. The programme is educational and informative. It provides publicly candid and personalized counselling. It is one of the many steps Uganda has taken in the fight against the killer disease.

The Facts for Life booklet referred to earlier was introduced to readers by the then ministers of Health and Information and the UNICEF Representative in Uganda. In his message, the latter, Mr Aklilu Lemma wrote:

“UNICEF also believes very strongly in the power of information ... and in partnership with WHO, UNESCO and ministries of health, Non-governmental organizations and business communities all over the world, UNICEF is striving to make these facts for life and life skills they entail, part of the basic stock of child-care knowledge in every family and amenity.”

The minister of information, Paul O Etiang wrote in his message that with the help of the book, Uganda journalists, broadcasters and editors who were already in the habit of disseminating information to the public about the diseases, would now be aided by ready-made and scientifically approved messages for dissemination. In his message, the minister of Health, Dr James Makumbi observed that there would be many fora that will find the booklet invaluable. Amongst the potential users the minister listed, local councils, clergy, health-workers community based health projects and others.³²

Counselling people living with HIV/AIDS is of the paramount importance in the war against the disease. In this concluding part of the paper, I will narrate reactions, events and attitudes as they have gradually changed in Uganda through the decades since the HIV/AIDS became a fact of life in the country's political, legal, economic and social life.³³

32 Page ii.

33 UHRC. The voices of patients, Kampala November 2003.

The first five years following the discovery of the disease in Uganda were the hardest and most trying for everyone in the country including the Government, the victims of HIV/AIDS and their relatives and friends. It is not an exaggeration to say that generally, the population was gripped with fear, resentment and horror. Many of the cases of HIV/AIDS infected persons were discovered by accident when those persons went to clinics or doctors complaining of other illnesses. Some of the doctors found it very difficult to inform their “innocent” patients that they were also victims of HIV/AIDS. The horror was magnified by the knowledge that the disease was not curable and was caused mainly by sexual intercourse, one of the greatest gifts bestowed on humans by God. Many of the diagnosed victims chose to end their lives than continue living with the fear of getting the visible manifestations of AIDS and slow death. Not only were victims feared and shunned but they were often seen as the architects of their own misfortunes and therefore deserving no compassion or pity. Female victims were often seen as women of loose morals who must have been sleeping with diverse men around them notwithstanding that in reality these were descent and faithful wives and partners who had been infected by their careless and immoral partners.³⁴

The initial judgmental reactions in the community had an adverse effect on the diagnosis and treatment of HIV/AIDS. Many people avoided going to clinics and doctors even for the simplest or commonest of diseases for fear that they may be diagnosed as HIV/AIDS victims and then be castigated and shunned by other members of society. In a minority of cases, when the patients discovered that they were infected, instead of abstaining from sex altogether or having safe sex with condoms, they decided to infect others by having sex with all and sundry. It is as if they found comfort in the knowledge that they would not be dying alone. The idea that they would not be alone in the world of HIV/AIDS somehow appeared to appeal to their misconceived sense of justice.³⁵ Relatives of those who are sick did not always escape the wrath of the communities around them. If they were partners of the afflicted, they were also avoided in the belief that they too must be sick with a disease. They were often seen as the ones who infected their partners. If they were parents or other close relatives, they were seen as irresponsible and as people who had failed in their duty to protect their loved ones and the family.³⁶ They were branded as having been irresponsible for allowing their children or

34 The Monitor Newspaper, 20 April 2004, page 23.

35 As to the rights of people living with HIV/AIDS, see UHRC monthly magazine: vol.viii, number 1 of January/February 2005, page 4.

36 For a general discussion of custody, care and maintenance: see Willy Mutenga & Nyoike Waiyaki, eds. *You and the Law*, OUP, Nairobi, 1990.

102 *Kanyeihamba's Commentaries on Law, Politics and Governance*

siblings to go wild, loose and immorally get infected. Those relatives would also be shunned by some members of their respective communities.³⁷

Part of the problem in the early days of the virus was that many people believed wrongly that one could get infected with HIV/AIDS by physical contact, or sharing of food or water or of seats and toilets with people suffering from the disease or those nursing or living with them. Desperate victims and relatives started being misled by the uninformed and ignorant that HIV/AIDS and its signs were the results of witchcraft. Money and property were freely spent on witchcraft and medicine men and women in search of cures. Other reactions included the belief that the scourge was a punishment from God in anger because of the sins Ugandans had committed.³⁸

The statistical data of the period indicated quite clearly that the incidents of HIV/AIDS infection were increasing rather than decreasing. It was not until the present Government of Uganda came out boldly and publicly to dispel all these false beliefs and superstitions in preference for scientific knowledge and modern ways of combating or reducing the spread of it that HIV/AIDS in Uganda began to decrease.

The Uganda Government's methods of work opened up hospitals, clinics and private medical practices for national and international research and fact-finding missions. The said methods helped to raise the much needed funds for the war against HIV/AIDS. Today, the HIV/AIDS policies and practices of the Uganda Government are praised, emulated and copied both in Africa and beyond.³⁹

It has been part of the Uganda Governments objectives to reverse all these negative misconceptions and attitudes about HIV/AIDS. The results have been remarkable. Instead of Ugandans fearing and shunning those with HIV/AIDS, the reverse has occurred. Ugandans generally no longer regard the victims of HIV/AIDS as lepers. They are received and treated with love, compassion and understanding. In universities, schools and churches, students, pupils and parishioners know who amongst them is suffering from HIV/AIDS but they are

37 Sarah Baite-Kitonsa: *Law Ethics, Human Rights and AIDS, Training Manual for Community Awareness*, Kampala, Uganda. Also see: Downie A.: *The limits of parental autonomy: Family Law quarterly*, 2000, pages 16-57.

38 Mwesigwa Rosemary. K. *HIV/AIDS and Human Rights*, op.cit. Ch.1.

39 *Uganda Monitor Newspaper*, 20 April 2004 and *Kenya Daily Nation*; 22 June 2006.

content to be their friends, companions and will always come to the patient's assistance whenever it is needed.⁴⁰

In private sector employment and Government offices and institutions, a considerable number of workers are known by employers and workmates to be HIV/AIDS positive, but there is no discrimination against them. When they are absent because of illness or in search of drugs and treatment, their absence is not penalized by the employers or resented by fellow workers. Occasionally, employers and friends at work who are able will willingly contribute materially, financially and morally to the sustenance, treatment and wellbeing of the victims of AIDS.

Non-governmental organizations in Uganda have steadily grown in numbers since that country's civil war and its devastation in the early and mid 1980s. Political and military conflicts continue to disturb the country especially in the northern region of the country. Some of these NGOs and their activities are suspected not to be for the good of the country or the persons they claim to work for. Indeed, several have been prosecuted or deregistered. However, the NGOs which have mushroomed all over the country in the fight against the scourge of HIV/AIDS have done and continue to do commendable work. They tend to be founded on medical ethics, religious compassion and are often interlinked with international and UN agencies. They are often seen and appreciated as fulfilling a real need in the fight against AIDS. People from all walks of life contribute money and other aid-materials to them and their activities. It can be said confidently that without these NGOs supplementing the efforts of Government, the epidemic caused HIV/AIDS would not have been under the firm control as currently witnessed by the international community.⁴¹

6.6 DIAGNOSIS AND TREATMENT

One of the dramatic changes that occurred following the Ugandan Government's frankness and efforts to demystify HIV/AIDS was the willingness of most people who suspect that they may be victims of the virus to come forward and be tested for HIV/AIDS. Hospitals, clinics and doctors in private practice report the influx of people visiting them for testing. The scientific devices for the test are readily available in these hospitals, clinic and practices.

40 See UNAIDS: The Global Strategy Framework on HIV/AIDS: Leadership Commitments and Core Actions, pages 14-16.

41 For Uganda's position: see Prof. John Rwomushana: interview in "Your Rights;" HRC, Volume viii, number 1, pages 30-32.

104 *Kanyeihamba's Commentaries on Law, Politics and Governance*

The shock and anger of anyone finding out that they are HIV positive remain unabated and will always persist until the cure for the disease is found. In consequence, counselling of patients remains one of the most important priorities in the war against HIV/AIDS. Counselling is absolutely necessary before, during and after the tests and continuously throughout the lives of the patients. Counselling extends and is necessary for victim's partners, relatives and friends, ranging from actual visits to doctors and experts to general guidelines of counseling which may be provided by or in the media.⁴² However, it must all be with the consent and knowledge of the patient whose right to privacy gains greater significance in these trying times.

With regard to drugs, many countries including Uganda currently implement policies of making available and cheaply the prescribed medicines for HIV/AIDS.⁴³

6.7 THE HIV/AIDS TEST

The centres at which persons suspected of HIV/AIDS are tested have individual forms on which a number of questions are listed and to which the person to be examined is required to provide answers. They include, the name, sex and age of the patient and the name of the referring doctor. The patient is required to tick any of the following if present in him or her, severe pain, intractable nausea and or vomiting, recurring or persistent diarrhea and any other symptoms of AIDS related illnesses.

6.8 THE CD4 COUNT

The CD4 count reveals how strong a patient's system is and how far the HIV condition has advanced. It helps to avoid the risk of complications and debilitating infections. The CD4 count is also used to identify possible health problems for which a patient may be at risk and to determine which medications might be helpful. A CD4 count and a viral load test are ordered when a person is first diagnosed with HIV as part of a baseline measurement. Both tests should be repeated about two to eight weeks after starting or changing anti-HIV therapy. If treatment is maintained, a CD4 count should be performed every three to six months. Normal CD4 counts in adults range from 500 to 1,5000 cell per cubic millimeter of blood. In general, the CD4 count goes down as HIV disease progresses. Any single CD4 count value may differ from the last one even though a patient's health status has not changed. No special importance need be placed on

42 The New Vision Newspaper, Uganda. 22 April 2005.

43 See <http://www.hrw.org/reports/2003/Uganda> 0803/5. htm.

any one result. What is important is the pattern of CD4 counts over a period of time. If CD4 count declines over several months, the patient's doctor may recommend beginning or changing anti- HIV treatment or starting preventive treatment. CD4 count should increase or stabilise in response to effective combination of anti-HIV therapy.

According to public health guidelines, preventive therapy should be started when an HIV positive person who has no symptoms registers a CD4 count under 200. The CD4 count tends to be lower in the morning and higher in the evening. Acute illnesses such as pneumonia, influenza or herpes simplex, and virus infection, can cause the CD4 count to decline temporarily. Cancer chemotherapy can dramatically lower the CD4 count. There is no standard reference because reference values depend on many factors including the patients' age, gender and sample population.⁴⁴

However, it is now medically known that if the CD4 count is not well controlled and reaches to the lowest levels, HIV develops into AIDS. Whereas an AIDS patient may be recognized by visible symptoms, there cannot be any certainty about that recognition because as already noted, the same symptoms are likely to be caused by other diseases. In case of HIV infected persons, it is not possible to tell visibly or externally that they are patients of HIV/AIDS. Consequently, a difference has arisen between the rights of the HIV/AIDS victims to have their right to privacy and other rights respected and a possible right of those who live, work or socialize with them to be warned of the danger of getting themselves infected from the victims. The current position is that a partner in a sexual relationship who is infected with HIV/AIDS is counselled to disclose his or her condition to the other partner and then both can be counselled and treated together if that other partner is infected. Nevertheless, the question may arise when the diagnosed partner refuses to disclose the infection to the other or that other refuses to co-operate. Should there be a law to force disclosure and co-operation? Should such a law extend to everyone including employers or employees at work, students in schools and universities? Some countries have attempted to legislate and regulate such disclosures and compulsory testing of HIV/AIDS in some of the situations described.⁴⁵ It does not always work and is seen by human rights activists and others as an invasion of personal liberty. It is likely that the debate on disclosures and co-operation on HIV/AIDS will continue nationally and internationally until a compromise, if any, is reached.

44 Sunday Monitor Magazine: Health, April 25 May 2005.

45 See UNAIDS: HIV-Related Stigma Discrimination and Human Rights Violation from page 48.

106 *Kanyeihamba's Commentaries on Law, Politics and Governance*

In concluding remarks in this paper, it is worth recalling some or other landmarks in the international concern for human rights, especially those of women who are the worst victims of denials and violations of those rights.

The International Conference on Population and Development and the Beijing Platform for Action reflect international recognition of the inalienable nature of sexual rights of women. The Fourth World Conference on Women Platform for Action states, *inter alia*:

“The human rights of women include the right to have control over and decide freely and responsibly on matters relating to their sexuality including sexual and reproductive rights, free of coercion, discrimination and violence.”⁴⁶

For those who have tested positive and others who are already known to suffer from the HIV/AIDS disease, governments have expressed their willingness and commitment to action for expanded access to ARV drugs, including mobilization of national and international resources for the provision of drugs and other services.⁴⁷ Countries and especially member states to the International Conventions on Human Rights and HIV/AIDS have enacted laws which they largely enforce to ensure that HIV/AIDS patients are given special attention and are not discriminated against in education, employment and social services. Conversely, there are regulations to prevent the spread of or deliberate passing on of the disease to other people.⁴⁸

On a personal note, as a Ugandan who has participated in the fight against HIV/AIDS as a member of Parliament, minister of Commerce, of Justice and Attorney General, Senior Presidential Adviser and now Justice of the Supreme Court, I am modestly encouraged by the knowledge that today, the international community identifies Uganda as a success story in the sub-Saharan Africa in its efforts to reduce the levels of HIV prevalence.⁴⁹ However, much more remains to be done in Uganda and the World at large against the pandemic.⁵⁰

46 The information about the CD4 Count was kindly given to the author by Mr Andrew Waswa Nsubuga of the Joint Christian Medical Stores, Kampala, Uganda, on 23 August 2005.

47 4th World Conference on Women, 1995; also see Harsh Husbando bar wives from Aids Treatment, New Vision Newspaper, 12 April 2005.

48 *Ibid.*

49 UNAIDS: HIV related stigma, Discrimination & Human Rights Violations: UNAIDS/05.05E, English, April 2005.

50 The East African Magazine, May 30 – 5 June, 2005 & WHO: Geneva, Pharmaceuticals and the WHO Trips Agreement, March, 2000.

CHAPTER SEVEN

THE DEATH PENALTY DEBATE IN UGANDA

7.1 INTRODUCTION

The debate about whether or not the death penalty for heinous offences should be retained is an ongoing exercise.

A crime has been described as a public wrong whose commission results in criminal proceedings, which may in turn, result in the punishment of the wrong doer. It is a main characteristic of crimes that unlike other wrongs such as tort or breach of contract, it is not left to the individual affected to bring in or withdraw from court an action involving the offence. Consequently, while the law permits private prosecutions, most criminal prosecutions are brought by or in the name of the State.¹

In the American Law Institute's Model Penal Code, the purposes and objectives of the substantive law of crime in a modern legal system are fivefold. They are:

- (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to an individual or public interest;
- (b) to subject to public control, persons whose conduct indicates that they are disposed to commit crimes;
- (c) to safeguard conduct that is without fault from condemnation as criminal;
- (d) to give fair warning of the nature of the conduct declared to be an offence; and
- (e) to differentiate on reasonable grounds between serious and minor offences.²

From these set objectives and my comments on selected areas of criminal activities and procedures, you may be able to judge whether under the Uganda criminal justice system, all or any of them are achievable. In practice, we do not have any reliable statistics to prove one way or the other, whether any measurable success or failure have been registered.³ Nonetheless, as judicial officers and administrators in

1 *Osborn's Concise Law Dictionary*, (6 ed), Sweet and Maxwell, page 103.

2 Article 1102(1).

3 However, see Ssesional Returns of High Court judges deposited in the High Court Library, Kampala.

active service of law interpretation and enforcement, we do have some ideas as to the trends and fashions in this field of human endeavour and misadventures. Criminal Law can easily and often does define precisely what is forbidden as inexcusable, it is not always possible to prevent what is forbidden from occurring.⁴ For this reason, the criminal procedure moves into further planes of detection, apprehension, detention, trial and punishment with the ultimate sanction of sentencing.

Criminal Law assumes, in the absence of evidence to the contrary, that people have it in their power to choose whether to do criminal acts or not, and that he or she who chooses to do such an act is responsible for the resulting consequences.⁵ The law further assumes that the subsequent evil which results from the commission of crimes can be well measured and graded, so that there is an elaborate scale of permissible punishments, varying from death to a mere fine depending on the degree of wickedness society attaches to a particular crime.⁶ If the judicial officer's task is to do justice, then punishment must be co-related to justice. The judge or magistrate asks whether according to the justice and circumstances of the case, is the punishment deserved or not? If punishment was to be based purely on theories of deterrence and reformation, the question of what the convict deserves may be eliminated. Courts often act on the assumption that the punishment is proportional to the moral guilt implicit in the crime.⁷ Should a court take into account the degree of revulsion felt by law abiding members of the community for the particular crime committed? Thus, the late Lord Denning, L.J., said:

"The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else ... The ultimate justification of any punishment is not that it is a deterrent, but that it is emphatic denunciation by the community."⁸

It is a theme that runs in judicial pronouncements that while judges should not be influenced by public hysteria, they must take into account the general attitude of responsible members of the public in order to sustain respect for the law. It has been observed that criminal law must represent a remarkably high average of the population's views with regard to penalties and the law abiding citizen must feel

4 Smith and Hogan: *Criminal Law*, (3 ed), pages 1-5.

5 Penal Code Act, sections 7 and 10.

6 See C.S. Lewis (1953) 6 *Res Judicatae*, 224 at 225.

7 H.M. Hart: *The Aims of Criminal Law*, (1958) 23 *Law and Contemporary Problems*, page 405.

8 *The Changing Law*, 112.

that the law is effective in protecting him or her from the infractions of his or her liberty by wrongdoers. However, vengeance against wrongdoers is not uncommon feeling in the populace. For certain offences such as sexual ones, vengeance is a factor which is sometimes taken into account to assuage the feelings of members of society.

7.2 CONSTITUTIONAL LICENCE

Article 22(1) of the Uganda Constitution which protects the right to life provides that no person shall be deprived of life internationally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and, the conviction and sentence have been confirmed by the highest appellate court.

Thus, the Uganda Constitution preserves the death sentence for persons convicted and sentenced for what the laws of Uganda define and describe as capital offences, most of which are to be found in the Penal Code Act of the country.

Today, the world is divided into two sets of countries, namely, those whose Constitutions and laws impose capital punishment or the death penalty and those of which do not. The latter category of countries consists of states, which have adopted Constitutions which prohibit or which have been construed by the courts as prohibiting the death penalty. Whether they are of the first category or the second, these countries vary in their manner and degree of development and are of diverse political, economic and social characteristics.⁹

Besides the countries which have abolished the death penalty, there are international, regional and national organisations, associations and groups of people who are known campaigners against the capital punishment and wish to see it ended everywhere in the world. People who are against the death sentence see it as uncivilised, barbaric and revengeful and as an anomaly which has no place in the modern world of science, technology and humanity. Human rights activists and organisations such as Amnesty International are in the forefront of this campaign.¹⁰

However, before Uganda joins the bandwagon of abolitionists, we need to understand and appreciate the idea of crime and punishment and why it is necessary sometimes to impose maximum punishments upon offences.

9 Walker. *The Aims of a Penal System*.

10 For the Debate in Uganda. The Uganda Human Rights Commission, *Monthly Magazine*. Death Penalty in Uganda, Yes or No? Volume II number 6 June-July, 1999.

The general public view of crime is that it is a deliberate act which should be punished because it is a sin or morally blameworthy. In criminal law, it is assumed that, in the absence of evidence to the contrary, people have it in their power to choose whether to do criminal acts or not, and that whosoever does such an act is responsible for the resulting evil. The law also assumes that criminal acts which result in evil can be graded from the least serious to the most heinous so that it is also possible to grade the scales of punishment to fit each crime committed. In the case of Uganda, one may be cautioned or have a small fine imposed for minor offence or have custodian sentences ranging from one day, months, years to life imprisonment. For the most serious offences such as treason, murder, rape or aggravated robbery, the convict is sentenced to death.

The first developed concept of punishment is therefore retribution for the moral blameworthiness caused by the offender. In furtherance of the theory of retribution one judge once said:

"I am of the opinion that this close alliance between criminal law and moral sentiment is in all ways healthy and advantageous to the community. I think it is highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred."¹¹

Yet another judge said:

"The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive ... the ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime."¹²

Therefore, whereas it is a principle of the Judicial Oath that a judge should not be influenced by public hysteria, he or she must nevertheless take into account the attitude of responsible members of society, if respect for the law is to be upheld. The punishment must represent a remarkable high average of the population's views with regard to penalties. The law abiding citizen must feel that the law is effective in protecting him or her for infractions of his or her liberty by wrong doers. There is also a public desire for vengeance against wrong doers. To this end, another judge said:

"In the reality of the social process an important end of the criminal law is to reinforce and uphold the moral sentiments of the community that favour the promotion of virtue

11 2 H.C.L. 81-82 per Stephen, J.

12 Per Lord Denning, L.J., R.C.C.P., [1953], Cnd. of 932 page 18.

and discourage the pursuit of evil doing, and in gratifying the desire for retaliation which a crime arouses, and by way of deterrent example.”¹³

Retribution means not only that the convicted person should receive a punishment which is proportional to his or her moral guilt but the punishment must also be proportionate to the harm done. In this latter sense punishment is tantamount to retaliation. The judge seeks to do justice by imposing the sentence the criminal deserves.

The overriding consideration in sentencing is the protection of society. Therefore there must also be an element of deterrence in the punishment aimed at both the convict so that he may not repeat the offence or commit others and also against other potential criminal doers.

It is worth noting that there are no empirical research statistics proving that punishment as a deterrent works one way or the other, but we live in hope and comfort.¹⁴ Nor, will lack of statistical data stop public prosecutors from demanding and judges imposing exemplary sentences. Most members of the public appear to agree that such exemplary sentences are desirable and necessary.

Apparently, we hardly even consider that in imposing deterrent or exemplary punishments we are also breaching the principle of equality before the law as far as convicted persons of similar offences are concerned. When a court speaks of protecting society, it generally means protection by the deterrence of others. Society is also protected incarcerating the individual offender for a long time or as in the case of death sentence, forever. This kind of punishment is preventive if not curative. Reformatory or rehabilitative punishments have become fashionable these days. There are modern advocates of the reformed school who argue that reformatory sentences should be the main object in any sentencing system.¹⁵ To this liberalism in criminology, one learned Chief Justice retorted, “*The function of the criminal law is deterrence, not reform.*”¹⁶ Convicts and those who may wish to emulate them must be told in no uncertain terms that crime does not pay and they cannot commit offences against society with impunity.

Notwithstanding the different theories of punishment described, the courts of today are acutely aware of the need to reform convicts so that they became law abiding and useful members of society. This is more so in cases involving young

13 Cordozo, J. Selected Writings, 378.

14 See The Criminal Session Returns of the High Court of Uganda, High Court Library, Kampala.

15 Morris and Howard: Studies in *Criminal Law*, at page 175 and D.A. Thomas: *Sentencing. The Basic Principles* [1967] Crim. L.R.. 455 and 543.

16 Lord Denning, L.J. cited in Smith and Hogan, *Criminal Law*, (3 ed), Butterworths, page 7.

offenders and minor offences.¹⁷ On the other hand, there are those in society who express concern about the public expenses involved in keeping in jails for long periods convicts and of finding and maintaining equipment and resources for reformatory and rehabilitative purposes.¹⁸

Moreover, in their zeal to embrace modern thinking about the theories of sentencing, some advocates of liberalism, often forget the ghastly acts committed by convicts against their victims. Anyone who has witnessed the consequences of crime, mutilated bodies, slaughtered civilians and police and army personnel, hosts of widows and orphans, the horrific massacres of communities, and the traumatised women and children who have been raped and defiled, is not one likely to lose sleep over the culprits who are given the maximum punishment allowed by law. The callous and brutal manner in which some of the victims are treated leaves very little room for sympathy for the violators of victims' human rights. Modern society may have become so civilised as to forget the biblical maxim, "*a tooth for a tooth and an eye for an eye*", but it would certainly be contrary to public policy to treat those who commit heinous offences with kid gloves.¹⁹

Incidentally, within the populations of countries which do not impose the death sentence, there is ample evidence that the majority in the population are not always happy that people commit serious offences and get off lightly. The abolitionists tend to be small groups of elite minorities with the loudest voices in society.

In Uganda we have special problems and conditions which make it undesirable for the time being to abolish the death sentence. It is ingrained in our culture that he who takes another life must forfeit their own. There is the added difficulty in Uganda that many people do not appreciate the line of demarcation between the innocent killings of a human being and murder with malice aforethought. Whereas lawyers and the elite in society understand that to be guilty of most crimes the accused must not only have done the act but must have had the intention to do so knowing that to do so was wrong and prohibited by law, the majority of our people do not always appreciate that fine distinction. The law insists that for one to be guilty as charged, one must have done the act (*actus reus*) and had a guilty mind or intention to do so (*mens rea*). In Uganda, it takes just one or two shouts that a person has done the act such as, taking away someone else's property (*theft or*

17 In Uganda, the law provides for the trial of young offenders separately and their treatment to be mainly reformist. See the Stewart case discussed in the (1961) Crim. L.R. at 844.

18 The Uganda Human Rights Commission, Monthly Magazine, op.cit. from page 31.

19 See [1961] (U.K) Cmd. 1289 at 76.

robbery), life (*killing*) and, the crowd sets upon that person and beats or kills him or her without waiting to hear any evidence of whether there was a guilty intention (*mens rea*) as well.²⁰

It is important that abolitionists of capital punishment first undertake to educate our masses to appreciate that the carrying out of constitutional and legal executions of wrong doers is barbaric and wrong before they convince the law-makers to effect the amendment of both the constitution and the law. In the absence of such education and sensitisation, the knowledge that those who murder, rape ravage and carry out aggravated robbery will no longer be liable to be sentenced to death will constitute a licence for the population to take the law into its own hands and execute suspects including innocent ones before they are fairly tried by courts of competent jurisdiction. It is understood that the Uganda Government has accepted the recommendation of the Ssempebwa Constitutional Review Commission that the death penalty continue to be the law of Uganda. The Cabinet has recommended to Parliament to so decide.²¹ For these reasons, it may be decades within the Third Millennium before the subject of the death penalty becomes a serious matter for reform in Uganda. Meanwhile, judges will continue to enforce the law and the Constitution in accordance with their Judicial Oath and if the law and the Constitution are amended.¹

I have no doubt judges will also implement them as amended. In the recent Constitutional Petition number 6 of 2003, the Constitutional Court held that while the death sentence was provided for and justified in the Constitution, it was nonetheless unconstitutional for Parliament to retain or enact laws which make capital punishment mandatory. In their reasoned judgment, the majority Justices of the Court held that the mandatory nature of capital punishment eliminates the discretionary powers of the court which are inherent in the administration of justice. At the time of writing, the decision of the Constitutional Court in the Court of Appeal is the subject of appeal to the Supreme Court, the highest appellate court in Uganda. However, until that appeal is disposed of in the Supreme Court, the interpretation by the Constitutional Court remains the law. Indeed in one High Court case, High Court Criminal Session Case number 122 of 2005, *Uganda v Bizimana Jean Paul alias Van N. Ndane*, the judgment of which the

20 G.W. Kanyeihamba, *The Law and the Individual in Uganda*, Makerere University, mimeo, 1969.

21 See The Report of the Commission of Inquiry (Constitutional Review). The Government Proposals, XXV, 10 October 2003, Government Printer, Entebbe.

22 Many abolitionists argue that judges should take the lead in outlawing capital punishment. See: Father Tarcisio Agostoni: *May the State Kill?* Paulines Publications, Africa/Daughters of St. Paul Nairobi, 2002.

learned trial judge delivered on 16 January 2006. The judge felt himself bound to follow the decision of the Constitutional Court. After the conviction of Bizimana for murder, the learned judge heard Bizimana's counsel on mitigation and instead of imposing the mandatory death sentence, he imposed a custodial sentence of fifteen years' imprisonment.

In any event, following the decision of the Constitutional Court on mandatory capital punishment, the firm of Katende and Ssempebwa of advocates was instructed by prisoners on the death row to file an application in the Supreme Court seeking postponement of all the death sentences which had been imposed on the those convicts until the appeal which is pending in the Supreme Court is determined. They did so in the case of *Philip Zahura v Uganda*, Criminal Appeal number 16 of 2004. We granted the application and in a series of criminal appeals in this court involving mandatory death sentences, we postponed the execution of those sentences. Thus, in our judgment in Criminal Appeal number 32 of 2003 *Mwayi Antonio and others v Uganda* which we delivered on 15 February 2006 and confirmed conviction we ordered as follows:

"However, in conformity with our decision in *Philip Zahura v Uganda*, Criminal Appeal No. 16 of 2004 (SC), we postpone confirmation of the death sentences under Article 22 of the Constitution until the determination of the appeal against the decision of the Constitutional Court in Constitutional Petition number 6 of 2003."

In 2009, we eventually heard and resolved the appeal as follows:

- (i) The death penalty, as far as it is provided for in the Constitution is lawful.
- (ii) The devices used to put to death a person convicted of a capital offence are lawful.
- (iii) To keep a person condemned to death on the death row for more than three years is cruel and inhuman. Consequently, if the President does not sign the death warrant within three years of conviction and sentence, the sentence shall be commuted to life imprisonment without remission.

CHAPTER EIGHT

WEAKNESSES, FRUSTRATIONS AND FAILURES OF POLITICAL PARTIES IN UGANDA

In real democracies, it is opposition political parties and groups which keep governments in check and criticise executive failures or excesses. To do so, they must be principled themselves, constitutional and vigilant in the affairs of state. Such opposition offers itself and behaves just like the incumbent government, in waiting. It has counterpart structures and credible leaders and is seen as a possible and not merely a probable next government.¹ Like the incumbent government, the alternative shadow government, has a presence and supporters throughout the length and breadth of the country. The population at large accepts it as part of its governance and tradition. This has not been the tradition in Uganda.

It can be stated categorically that, perhaps with the exception of the short-lived administrations of self-Government of Benedicto Kiwanuka in 1961, of the UNLF under both Professor Yusuf Lule and QC Godfrey Binaisa all of which were weak and dominated by opposition parties or groups, Ugandan governments have been all powerful and authoritarian.² This characterization applies equally to the colonial government that ruled the country from 1894 to 1962.³

Immediately following the attainment of independence, in 1962, there was some semblance of democratic rule for several years when political organizations such as the Uganda People's Congress, the Democratic Party, the Conservative Party and the transient Kabaka Yekka, operated with some successes. However, after defections and ineffective leadership weakened the Democratic Party, Kabaka Yekka ceased and the Conservative Party made no headway in recruiting converts, the UPC appeared to swallow every one around it, and converted the country into a *de facto* one party state.⁴

1 See Harvey J and Bather L: *The British Constitution*, (4 ed) MacMillan Education, 1977, page 176

2 Gariyo Zie: *The Press and Democratic struggles in Uganda: 1900 – 1962* in Uganda: JEP Book 12, Vienna, 1993, page 405. also Gardner Thompson: *Governing Uganda*: Fountain Publishers, Kampala, 2003, ch.15.

3 Mulira J: *Nationalism and Communist Phobia in Colonial Uganda*, 1945 to 1966, in Mawazo, June, Volume 5, number 1, Kampala.

4 Hancock J1973: Obote and Amin: *Change and Continuity in Modern Uganda Politics*, African Affairs, July, Volume 72, number 288.

The total period of the short-lived administrations of Kiwanuka, Lule, Binaisa and those of the Military Juntas of Paulo Muwanga and General Lutwa Okello is less than three years. Incidentally, the latter two were also authoritarian. Be that as it may, it can be discerned from this, that for more than 100 years, Uganda has been ruled largely by monolithic, authoritarian and non-democratic governments.⁵ This has been the case notwithstanding that for about half of that period, Ugandans have been led to believe or have been told that Uganda was or will be a democracy. Both the belief and message have turned out to be false every time.

Thus, in a working democracy, opposition parties and organizations are the reverse side of the coin of which the government of the day is the other. Without vigilant and effective political pluralism, true democracy is not possible. In an earlier work, I described a political party as a body of men and women united for promoting by their joint endeavours, the national interest upon some particular principle in which they are all agreed. I also noted that during the colonial period, such people were considered by the rulers as dangerous agitators since those rulers had arrogated to themselves the prerogative of determining what principles and accompanying policies were in the national interest.⁶ Since that time and through independence to the present time, in Uganda, the idea that opposition parties are necessary for democratic governance has never been firmly rooted in the population or easily accepted by whichever group of Ugandans or individuals happened to be exercising the powers of government.

At best, for any stage of its constitutional and political development of Uganda, political parties have always been perceived by the ruling oligarchies as subversive, anti-government and therefore adverse to the interests and needs of the population. At worst, they have been branded treasable and become proscribed.⁷ Indeed, repressive measures against opposition parties and preventing them from operating normally have been resorted to on many occasions throughout Uganda's existence as a country.⁸

Some writers have argued that one of the reasons why multiparty democracy has failed in Africa is the traditional attitude of the African peoples towards governance. They advance the theory that in Africa the population only knew and recognized government, its personnel and supporters and had no concept or belief that such setup should be opposed by some extrinsic group of other people

5 That is, since the declaration of its protectorate status, 1894.

6 Gallagher J: *The Decline and fall of the British Empire*, Oxford University Press, 1982.

7 See Gardner Thompson: op.cit.ch. 12.

8 Forward Alan: *You Have Been Allocated Uganda*: DPC, Dorset, England, 1999, page 137.

however described who identified themselves as alternative force ready to replace the incumbent government.⁹ It is contended by the proponents of this theory that African kings and chiefs wherever they were and whoever they governed, knew not and never tolerated opposition groups to emanate and flourish in the same nation, tribe or clan.¹⁰ On the other hand, there is ample historical evidence and incidents to show that this theory is flawed. From ancient African kingdoms, dynasties and great chieftainships, the concepts of opposition parties both within and outside the ruling groups were well known and are fully recorded. The processes of succession and removal and replacement of rulers and leaders are acknowledged by a number of researchers and writers as having existed in Africa.¹¹

The greatest weakness of political parties in Africa has been in the purpose and rationale that pre-empted their foundation and existence in the first instance. During the colonial period, they were founded to oppose foreign dominance and rule. With the attainment of independence, the prize to govern the country was taken by one of their group which happened to be the biggest or strongest at that particular time. The rest of the opposition groups found themselves politically naked and without a purpose. The political rhetoric they had so eloquently used during the fight against colonialism was removed from them by the grant of independence. The policies and schemes they had promised to their respective populations were inherited by the new leaders who inherited the mantle of power.

It took time for the post-independence governments to settle down and originate new concepts and ideas of governance. During this period, leaders and supporters of the opposition groups got frustrated because they were now without a cause or purpose. Many of them decided or were persuaded to join the ruling party.¹² By then it had become obvious that only the leaders and supporters of the ruling group had free and easy access to the national facilities and wealth. For much of the period after independence, government had become the biggest owner of the national assets, dispenser of employment opportunities and provider of welfare. It had become increasingly obvious that any individual who wished to benefit from the wealth of the nation had to be seen to be a supporter or a friend of the ruling oligarchy.¹³

9 Milner Grey, Sir John: *Early Treaties in Uganda* (1888-1891), Uganda Journal, 12, 1948.

10 Holzer Werner: *The Tribe: Africa's Favourite Scapegoat In Africa*, number 5 of 1970.

11 E.g Gardner Thompson: op.cit. page 17; Davidson Basil: *The Search For Africa: A History in the Making*, pages 144-171.

12 Hopkins Terrence K: *Politics in Uganda*, in Bulter Jeffrey and Coslano AA (eds) Boston University Papers on Africa, Praeger, New York, 1967, pages 251-290.

13 Mazrui Ali A: *Constitutional Change and Cultural Engineering: Africa's Search For New Directions; In Oloka-Onyango: Constitutionalism in Africa*, Fountain Publishers, Kampala, 2001, pages 18-36.

It increasingly became clear that it was the members of the government and its supporters who mostly benefit from government employment and who enjoy other privileges. It is the government which owns and controls the main means of production and profits. It is the same and its adherents who allow anyone access to world markets for trade and handouts. Conversely, opposition parties have very little of their own to offer to their supporters or the population.¹⁴ With such economic power and monopoly of the right to determine and distribute the national cake to all and sundry, the government party and its supporters become politically unchallengeable and the most attractive group in the land. Indeed, as long as the country remains poor, this state of affairs is likely to persist for a long time.

Another factor that has tended to undermine the credibility of opposition political parties is lack of internal democracy within the parties themselves. From independence throughout the turbulent years of the 1960s to the military rules of the 70s and 80s up to the advent of elections in 2006, Ugandan political parties and organizations have been led by the same groups of individuals both in and out of government. The occasional cry for the need to democratize these parties and organizations is often ignored or met with apparent tokenism and deception. The few attempts to effect internal democratization of the political parties and organizations have been stage managed or corrupted only to end in disappointment, with the old guard still firmly in charge of them.¹⁵

Consequently, when the leaders of these political parties agitate for the democratization of the country or accuse the incumbent rulers for clinging to power, few Ugandans take them seriously. They are seen as selfish leaders who campaign for democracy and change of leaders in the incumbent government for the sole purpose of creating room for themselves. They offer very little by way of alternative philosophies or policy and their manifestos and political programmes tend to be remarkably similar to those of the government side even if their respective phraseology appears different.

They are thus, presenters of differently labelled political packages with identical contents within. Unfortunately, the population is sometimes easily fooled by the different slogans originating from the political parties and organizations. However, this is not to say that Ugandans as a whole would not wish to see change in the style and manner in which they are governed. A country becomes fed up seeing

14 Mamdani Mahmood: *The Politics of Democratic Reform in Contemporary Uganda in E.A. J.P.H.R.* Volume 2 number 1, 1995, page 97.

15 As a result, these old parties were virtually ignored in the 2006 general elections. See EC report of the results. February 2006.

Weaknesses, Frustrations and Failures of Political Parties in Uganda 121

the same faces and hearing the same messages from the same leaders for decades and change becomes desirable not for the sake of it but because leaders are human. They are liable to be exhausted and soon run out of fresh ideas of development and innovation.¹⁶

The desire to change leadership in the population becomes so overwhelming that the phenomenon is not lost on the incumbent rulers themselves. However, there is no where in the world where the ruling class simply volunteers to hand over power to the opposition parties. In each case, it is for the latter to appear so attractive and persuasive that the population turns to them as worthy alternatives to those who have governed them for so long. For this to occur, the opposition political groups must democratize internally, organize and campaign nationally under their constitutional rights to associate and assemble freely and disseminate information and ideas.

In Uganda, the political rights under which political parties succeed in offering themselves to the population as alternatives to the groups in power have been severely curtailed and undermined. The curtailment of freedoms of political parties to freely associate, assemble and campaign and be elected to office have been very much proscribed under the National Resistance Movement. Thus, one foreign team observed:

“Government harassment and discriminatory legislation are suppressing independent political activity in Uganda. Uganda has become the darling of the Western Powers but Uganda is moving a way from democracy, not toward it. The movement political system is inherently hostile to democratic freedoms.”¹⁷

In order for the National Resistance Movement to perpetuate itself in power with a belief that other political parties will never have a chance to replace it, its leadership put in place protective mechanisms. The NRM was conceived and structured as a state organism to the extent that from the grassroots with its RCs, now LCs system to the national level with the National Convention, caucus and High Command, the NRM party is indistinguishable from the state of Uganda. Over the years, the organism has become exclusive, monolithic, self-perpetuating and hostile to any opposition to it. Its critics are not perceived as political opponents but as enemies of its leaders and of the state of Uganda. Its leaders identify its continued existence and survival with those of the nation of Uganda. They have gone all the way to operate and manipulate the Constitution, law and practices of governance of the state of Uganda in order to strengthen and protect

16 Mamdani Mahmood: *The Politics of Democratic Reform in Contemporary Uganda*, op.cit. pages 100-1.

17 US Human Rights Watch: *Uganda: Hostile to Democracy: The Movement System and Political Repression in Uganda*, New York, August 1999, page 1.

the NRM state organism.¹⁸ For the sustenance of the organism and its leadership, Government has been ready to issue inaccurate information, to spend millions of shillings in the defence of the organism and even to annoy and defeat its own supporters whose loyalty it regarded as suspect.¹⁹

The only way other political parties and organizations which wish to offer themselves as alternatives to the movement government is to weaken or have dismantled the NRM state organism. In order to protect and perpetuate the NRM state organism, the leadership of the movement set out deliberately to plan and scheme for that purpose. The first obstacle in their way was seen as the 1995 Constitution which they had themselves inspired and made.²⁰ It had to be amended. The leadership knew that the population and many members of Parliament were opposed to the dismantling of the Constitution. The leadership embarked on a campaign of changing this country attitude to one which was at best favourable or tolerant. The facilitation of this transformation included making generous offers of unachievable promises, the balkanization of Uganda into tiny tribal and clan districts with the inevitable mushrooming of government supporters in the names of District headquarters, Resident District Commissioners, and goodies for the District bosses. To entice members of Parliament to pass Constitutional amendments and enabling laws, the NRM leadership offered "facilitation" fees to individual members, ranging from 5–10 million shillings each, which is quite a large sum of money by Ugandan economic standards.²¹ Political leaders who defended the 1995 Constitution were denounced and expelled from the NRM inner circles of consultations. Cabinet Ministers who opposed the leadership in its quest to remain in office indefinitely and drop principles which had helped it to come to power, were castigated and expelled from Cabinet.²²

In anticipation of the pending referenda and general elections, corruption and manipulation of the electoral laws and bribery of voters became the norms of politics and governance in Uganda.²³ In a very poor country like Uganda where the government can only be sustained in office and have its bills paid with the help of handouts from donor countries and organizations, the power of the purse became

18 There were heated debates about the enactment of the Referenda Acts and amendment to the 1995 Constitution, with the NRM and the Executive coercing and facilitating the population to support their approval. The Acts were subsequently held to have been illegally enacted.

19 See New Vision, Thursday 28 October 2004.

20 See Kanyeihamba G.W: *Constitutional and Political History of Uganda*, op.cit, page 257.

21 See the New Vision 28 October, 2004 and Monitor, 28 October, 2004

22 Among them, an acclaimed long time friend of the President, Eriya Kategaya, long serving Cabinet Minister, Bidandi Ssali and one of the most effective women politicians in Uganda, Miria Matembe.

23 See FHRI Report: Periodic Election Observation Report, 15 February 2006.

irresistible. Local leaders and voters alike received payments in cash or in kind with clear messages that the NRM leadership had to be supported for better or worse.²⁴ Politics and the electoral process were truly monetized. Merit, integrity and competence found themselves outlawed from the politics of Uganda. Many members of the opposition parties and groups who discovered that unless they joined in the new system of evolving leaders they would never be elected, did likewise.²⁵ Those who persisted in remaining independent also bribed and corrupted government and electoral officials. Nonetheless, they were eventually out gunned by the seemingly inexhaustible resources harnessed by the incumbent government and its supporters. Both government and some opposition leaders flouted the law about funding of political parties, organizations and activities. Individual senior government cadres and other politicians were caught and reported in the Press as being corrupt and as having broken laws in their quest to stay in office, but the law enforcement agencies appeared uninterested or frightened to do anything about these allegations of crime.²⁶ Indeed, in some cases, it was the informers who had reported the alleged offences who were themselves treated as suspects.²⁷ In some incidents, criminal processes were utilized to frustrate or restrict the liberties of those opposed to government and the ruling oligarchy.²⁸ The army, the police and security forces appeared to have been so reorganized and commandeered solely for protecting and sustaining the NRM state organism. What had started popularly as an all embracing, tolerant and meritorious movement in the 1980s, became an awesome, authoritarian feared and threatening state machine for one single purpose of perpetuating itself in power.

For the first time in decades, both in the earlier referenda and in the general elections of 2006, the NRM lost considerable ground in its popularity ratings. What was even more disturbing for the NRM leadership in this loss was the lack of support was not only amongst the elite of the country whom the leadership always suspected of being critical of its methods but also amongst the peasants who had been claimed to be the lifeblood of the same leadership.²⁹ Nearly forty percent of the population including the whole of the North and North East of the country, in their yearning for change, voted overwhelmingly to reject the NRM leadership.

24 In an interview with Professor Mondo-Kagonyera, M.P and Minister in the Prime Minister's Office, 11 October 2005.

25 The Monitor, December 2005.

26 New Vision, 28 March 2005 (Vice President); The New Vision of 25 March 2005 and 28 March 2006, call for Health Minister to resign.

27 See the New Vision, February 2006.

28 Criminal Case number 149 of 2005 (Besigye – Rape).

29 See the Election Results of 2006.

Most voters in the urban areas including Kampala voted against the NRM leadership and its supporters.³⁰ When it is realized that it is in the urban areas where the educated, the enlightened and the relatively wealthy Ugandans live, work and associate, it does not take a genius to conclude that the phenomenon does not auger well for both the country and the NRM leadership. To add insult to injury, civil war and military confrontations in the Northern region of the country have been raging on for more than two decades.³¹ The voters in the country who voted overwhelmingly for Dr Kizza Besigye, the Presidential candidate for the Forum For Democratic Change Party did so not because they necessarily loved him but because they hated the NRM leadership.³² They, Like so many other Ugandans in other parts of the country were desperate for change, may be change for the sake of it. It can be said that they were all fed up with seeing the same faces of Government, hearing the same slogans and witnessing the same failures for twenty years. There can be no doubt that should the NRM leadership insist on using the same methods in seeking yet another term of office, Uganda will most likely disintegrate through civil strife. The warning is on the wall for all to see. Only sense and patriotism can save the situation.

It can be discerned from the foregoing discussion, that since its foundation as a separate international state, Uganda's successive ruling groups have effectively disliked and proscribed political dissent and opposition in the mistaken belief that only the ruling groups have the monopoly of wisdom to initiate and implement the right policies for the solution of the country's multifarious problems.³³ In reality, Uganda will be better off if the said ruling classes become more tolerant of the opposition groups and if the latter were better led and therefore more capable of offering themselves and seen by the population as worthy alternative governments. Sadly, for Uganda, neither have come anywhere near those expectations. Perhaps the only feature which all governments and countries share worldwide and of which Uganda is not an exception is that no leader, no political party or organization can stay in power in perpetuity.³⁴ Soon or later and more often than believed by those in power, each of them shall lose their present positions of power and employment and regret why they never thought of doing things differently.

30 2006 Election Results.

31 Uganda Human Rights Commission Report, 1997.

32 New Vision, March 2006; Red Pepper Tuesday 28 February 2006.

33 See Kanyeihamba: *Constitutional and Political History of Uganda*, op.cit page 333.

34 See Mazrui Ali .A.: *Containing Conflict in Africa: Methods, Mechanisms* and number 1, pages 81-90.

CHAPTER NINE

CORRUPTION

It is important to know and appreciate the meaning of corruption as provided in the law and perceived in society.

Section 1 of the Uganda Prevention of Corruption Act 1970 (Chapter 121), which is similar to other national Acts in many Commonwealth countries, provides that any person who, by himself (or herself) or with any other person:

- "(a) corruptly solicits or receives, or agrees to receive for himself, (herself) or for any other person, or
- (b) corruptly gives, promises or offers to any person whether for the benefit of that person or of another person, any gratification as an inducement to, or reward for, or otherwise on account of any member, officer or servant of a public body for doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of an offence."

Section 29 of the same Act defines gratification to include money or any gift, loan, fee reward, commission, valuable security or any other property, movable or immovable, any office, employment, contract, any payment, release, discharge or liquidation of any loan, obligation or other liability whatsoever, whether in whole or in part, any other service, favour, or advantage of any description whatsoever including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary or penal nature, whether or not already instituted, and including the exercise of or the forbearance from the exercise of any right or any official power or duty and any offer, undertaking or promise of any gratification within the meaning of all the above types and descriptions of gratification.

Thus, it is quite clear that the definition and descriptions of what in law is corruption are very wide and all embracing and include what are commonly known as bribes, grease, sleaze or whatever other names those offences are called. Moreover, bribe givers, receivers and their accomplices or agents, however

1 *Ibid.* Also see commentary by Mark Cooray in Exportability of Representative Democracy to the Third World: in *Essay on Third World Perspectives in Jurisprudence*:: Malayan law Journal Pte Ltd 1954.

disguised or traditionally known, are all guilty of the offences connected with corruption.

Interestingly, corruption is a worldwide phenomenon and is to be found in most countries whether developing or developed, poor or wealthy and irrespective of their historical, culture, political or socio-economic characterisation. Thus, writing in the *Malayan Law Journal*, Professor Phil Thomas then of the University of Wales, Cardiff, observed: "*Today, the inescapable and indisputable fact is that the rich and mature democracies are not immune to the cancer of corruption*". In the same article, Thomas proceeds to give a catalogue of corrupt practices in such diverse countries as the United Kingdom, the United States, Spain, Japan, Tunisia, Palestine and Ireland.²

Under national laws and regulations, anyone accused of corruption can be investigated, tried and punished and penalties include suspension or dismissal from employment, fines exposure and imprisonment. Surprisingly, there are relatively few cases of convictions and punishments recorded to indicate that countries take any serious administrative or legal measures to combat this social, political and economic scourge. What are prevalent in national archives are stories of *prima facie* and proved cases of corruption and gratification clearly and courageously reported to the authorities concerned. Those authorities that are empowered to take action feign ignorance, exhibit indifference or reluctance to follow up the stories and, in a significant number of incidents, actually condone the offences committed.³ In some of the cases, culprits whether actual or suspected, appear to benefit from the accusations made against them, for they are either appointed to public offices or are promoted, apparently in the belief that thereafter their loyalty to the appointing authority becomes firm and unalterable under any circumstances.

Nonetheless, in several cases, people have had the courage to report and prosecute suspects under the laws against corruption. The available statistics indicate that courts have been willing and ready to uphold the law and either convict or acquit those charged with the offences, depending on the evidence submitted. *East Africa Law Reports*, especially those of the 1960s and 1970s contain reported cases of persons convicted and punished for corruption in Uganda, Kenya and Tanzania. Unfortunately, since those times, the rate at which allegations of corruption are brought to court or suspects indicted has slowed down. Correspondingly, the perception and knowledge that corruption, like the scourge of AIDS, is spreading alarmingly far and wide in the region especially in

² *Ibid.*

³ The "Monitor" Newspaper, 6 June 2002.

Uganda and Kenya are firmly rooted in the minds of the population. To aggravate matters, most people see this spread continuing unabated with little or no control at all.⁴

9.1 PUBLIC PERCEPTION OF CORRUPTION

It may be useful to comment on peoples' perceptions of corruption and its impact on the social, economic and political development of the country and how it is eating through the souls of many of the people, the public service, Parliament, the Executive and the Judiciary and their respective agencies.

One of the major problems in combating corruption is the public's own perception of corruption. There seems to be a belief in most populations that only those who receive bribes are corrupt. The bribe giver and his or her agents are perceived to be innocent victims who had to bribe their way into the appropriate system in order to get the "justice" they felt they deserved. However, in many cases, it is the bribe giver or his or her agent who initiates the corruption process. He or she may have heard rumours that the potential bribe taker only makes favourable decisions for those who pay or promise to pay gratification dues before their case or matter is resolved. The case may be a strong one, but the bribe giver wishes to establish double insurance for his or her victory.⁵

Nevertheless, at the end of it all, it will be the bribe taker who will be identified as corrupt and will most certainly be the one charged with an offence under the law. Beyond the possibility of being summoned and appearing as a witness for the prosecution, the bribe giver or his/her agent goes scot-free. On the other hand, the law does not make a distinction between bribe givers and takers or their accomplices. They are all equally guilty, both morally and legally. Admittedly, occasionally, the bribe taker is caught by entrapment in which case the bribe giver is an innocent participant.⁶

9.2 CORRUPTION IN THE ELECTORAL PROCESS

In both local and national elections, whether for Local Councils, Parliament or the Presidency, it has become a habit, if not a convention, in Uganda as in many other parts of the World, for many voters to demand, and candidates to agree to make

4 See the East African Newspaper: 21 March 2005, page 10.

5 In a number of cases involving impropriety, Uganda Law Council members have observed in an interview with this writer that the alleged bribe givers would have won their cases, in any event.

6 With police or official knowledge and engagement; see also David Bonner: *Combating Terrorism: Supergrass Trials in Northern Ireland*. In MLR (January 1988) page 23.

certain payments in money or in kind in exchange for votes. This is clearly a form of corruption and the practice itself is a negation of democracy and the right of the people to freely choose their leaders and those who determine their destiny.⁷

Unfortunately however, very few voters and even fewer of the candidates perceive this practice as corruption or bribery in the traditional or legal sense of the term. Nevertheless, going by the definition and description of corruption, there can be no doubt that this electoral malpractice is a type of corruption which is outlawed and which ought to be fought against. Candidates sell off their assets to raise money for electioneering, the presumption being that after they are elected, they will become ministers or high public officials and then be able to use their influence corruptly to recover the losses they incurred during the elections.⁸

It is not often appreciated that in the game of politics, corruption looms large. A politician who gets the electorate's vote through public guarantees or promises that are broken after the election is certainly indulging in both deception and corruption. Constitutions and laws provide that there shall be regular, free and fair elections. Those who call for or organise such elections but do not adhere to the provisions of the law are also guilty of abuse of office and neglect of duty.⁹

An aspect of the constitutional electoral process is that the rights of candidates who choose to offer themselves for election are protected. Anyone who violates those rights or prohibits candidates or their supporters from exercising or enjoying their rights is as guilty of corruption as any other corrupt person in other areas of the law.¹⁰

9.3 INABILITY TO ACT ON CORRUPTION

One of the most disturbing aspects of corruption in public administration is the persistent accusations often documented, that named individuals are corrupt or guilty of habitual abuse of office in their respective departments, and the

7 In the Presidential Elections Petition of 2001 in Uganda, the Supreme Court recorded much of such evidence to the extent that the court's decision was delivered by a divided court of 3 to 2 Justices, see Presidential Petition number 1 of 2001 (S.C.), judgment.

8 One losing candidate who had been a Minister before the election revealed to this writer that he had spent a lot of money on the election because he believed that he would remain a Minister after the election and recover all his losses.

9 The former Chairman of the Uganda Electoral Commission was accused by opposition parties of having rigged the 2001 elections in favour of the incumbent government. See copies of both the Monitor and New Vision published after those elections.

10 In the 2001 general elections, several candidates and their supporters swore affidavits and claimed that they had not only been harassed but had been physically abused and beaten for not supporting the ruling movement, see Petition number 1 of 2001, (*supra*).

appropriate authorities neither react nor do anything positive such as ordering investigations to unveil the truth. In the rare cases where the persistence of the public and Press pays off and investigations are carried out and findings and recommendations made, the follow-up action and omissions are usually disappointing. This failure, coupled with the public knowledge that the culprits continue in their employment or are in actual fact rewarded by way of transfer or promotion, is evidence that combating corruption is not one of the top priorities of many governments, despite rhetoric to the contrary.¹¹ Several years ago, a corrupt magistrate was caught red-handed receiving a bribe. He confessed and returned the bribe money. The information was given to the Judicial Service Commission to discipline the culprit. At the time of writing this paper and some three years later, the magistrate is still working normally and apparently continuing to receive bribes. The Judicial Service Commission has failed or refused to act. Consistent allegations of corruption were also brought against a judge of the High Court. Both the Lord Chief Justice and the Chairman of the Judicial Service Commission stated that the evidence against the judge is overwhelming but the President who is the appointing authority, although briefed has failed to take any action to suspend let alone have the investigated.¹²

9.4 DIFFICULTIES IN IDENTIFYING THE CORRUPT

Bribe takers and givers do not commit their crimes openly or in public. They do not call witnesses to sign and countersign written documents of corruption. They do not publicly celebrate their deals. They do what they do in secret and, with a few exceptions, when they are caught the evidence against them is purely circumstantial. Government spokespersons and lawyers express the opinion that for anyone to be convicted at all there must be direct evidence and the case must be proved beyond reasonable doubt as in ordinary criminal cases. Such opinions fail to appreciate the dilemma facing people who are fighting against corruption.¹³

Combating corruption is the responsibility of the three organs of government, namely Parliament, the Executive and the Judiciary and/or their agents. Of the

11 See the findings of a Parliamentary Committee and Commissions of Inquiry where up to now no serious follow-up actions have been taken: Government archives, Entebbe and Kampala.

12 As narrated by both the Lord Chief Justice and the Chairman of the Judicial Service Commission at a meeting with the Justices of the Supreme Court at Mengo, 12 July 2005.

13 For instance, in both Uganda and Kenya, national leaders are on record as promising loudly to fight against corruption but continue to retain and promote supporters who are accused of or proven guilty of corruption or abuse of office. In his election manifesto of 2006, President Yoweri Museveni promised to reduce to zero, corruption in Uganda but continued to rely for his election campaigns on the services of Ministers who had been accused of corruption in the Ogoola Commission of Inquiry with the misuse of the Global Development Fund reported in the national newspapers at the time.

three organs, it is the Executive that is in the best position to shoulder the bulk of that responsibility and perform most of the tasks necessary in the fight against corruption. The reasons for this claim are easy to enumerate and discern.

In the first instance, it is the Executive or its agents who create most employment opportunities, vet, appoint, monitor, discipline and dismiss most public officials, especially in the developing countries of the Commonwealth. Secondly, it is the Executive that is the biggest employer of public officers. Thirdly, it is the Executive that controls the national purse and therefore is in a position to allocate the necessary funds for fighting corruption. Fourthly, it is the Executive which finances, advises and sometimes directs the principal institutions of state and personnel engaged in the war against corruption, such as the special security forces, the army, the police, the office of the Director of Public Prosecutions and the Ombudsman or his/her equivalent.¹⁴

It is the role of Parliament, in its sessions and reports, to enact the enabling laws and pass the necessary resolutions that will expose the culprits. The task of the Judiciary is to enforce the laws by declaring, in actual cases of litigation, the extent to which such laws may be implemented and enforced. It is not often appreciated that judges and courts can do very little on their own. For each allegation of corruption, it is for others, the police or the Director of Public Prosecutions, to bring the case against a suspect before the court. For the court to proceed and hear the case there must be a charge, properly filed and showing that the court has jurisdiction to hear the case. The accuser must show a *prima facie* case against the accused before trial. During the trial, the prosecutor must prove the case beyond reasonable doubt. Before and during the trial, the accused is presumed innocent until the prosecution had discharged its burden of proof. If the prosecution offers weak or insubstantial evidence and the court acquits, the prosecutors have only themselves to blame and no blame should be visited on to the Judiciary.

However, the Judiciary should be mindful of the difficulties facing a prosecutor with regard to the requirement for direct evidence in cases of corruption and should be willing to consider the possibility of convicting on adequate circumstantial evidence.¹⁵ A court which decides to acquit on mere technicalities of the law is itself not helping in the war against corruption.

14 In several cases of corruption, those indicted have been found not guilty with the presiding judges declaring simply that the prosecution failed to prove the cases.

15 In his outgoing report, the former Uganda Inspector General of Government lamented that the Executive and the Courts had failed to assist his office in its fight against corruption. See IGG Report, 2004. Parliament, Kampala.

Be that as it may, the Executive can always discipline or dismiss any suspect employee without having to wait until the case is proved beyond reasonable doubt in a court of law. In fact, and as will be observed later, an employer engages workers on a set of criteria of which one is that they have no convictions for corruption is a mere detail.¹⁶ Only in a few cases, where the police and the Director of Public Prosecutions have ample evidence that the accused is suspected of having been involved in corrupt practices, will court proceedings be commenced and culprits convicted.

9.5 CORRUPTION IN THE JUDICIARY

Where members of the Judiciary are said to be corrupt, a conviction is not easy to obtain.¹⁷ This is one of the reasons why society expects that judges and officials who exercise judicial or quasi-judicial functions have impeccable integrity, act and behave with impartiality and dignity and in accordance with the rigid rules of the legal profession, buttressed by the judicial oath.¹⁸ Those who do not must be identified and brought to account for their deviance and, if need be, dealt with severely in accordance with the law. Currently, there is an outcry in Uganda, against alleged corruption in the Judiciary and public service generally.¹⁹ If there are judicial officers who indulge in this illegality, it is incumbent upon the accusers to name them so that the relevant authorities can suspend, discipline and where necessary, remove them from their posts in accordance with the law. Persons who are unfit, by reason of suspected corruption to hold judicial or other public office should never be appointed to those offices and if it is discovered, after they have been appointed, steps should be taken to have them removed from office immediately. Any acts or incidents of behaviour that are alleged to be incompatible with the judicial office, ought to be enquired into immediately and not simply be discussed generally as a matter of gossip and speculation.²⁰ If persons who abuse the legal process are outside the Judiciary, there are other laws and procedures that can adequately deal with them and those should be utilised. However, it must be

16 See Newspaper advertisements for posts in the public service.

17 Judicial officers have the knowledge of what is required for a conviction and if they are the accused persons themselves, they have the ability to conceal the truth.

18 See ICJ Practitioners' Guide, Series number 1 of 2004.

19 See the IGG Reports, Parliament, 2002 – 2005.

20 In Uganda, the IGG reports, and in Kenya, several reports including those of the Kwach, the Panel of Eminent Commonwealth Judicial Experts, the Kenya Law Society, the Kenya Section of the International Commission of Jurists, the Ringera Commission and others; and in Tanzania, see Professor Haroub Othman of the University of Dar es Salaam in the *East African* of 21 March 2005, page 8 for Other Commonwealth Ombudsmen: see *Commonwealth Law Bulletin* Volume 12 number 2 of April 1986, pages 524–527.

emphasized that all disciplinary measures against persons, including judges and magistrates, must be effected constitutionally and legally.²¹

In an address to the European association of Judges underscoring the independence of the Judiciary, the Association's President said:

"In each society, people are looking for an institution where they can settle their conflicts in a peaceful manner. They expect a judgment uninfluenced by outside forces, passed impartially only by application of common, accepted legal provisions, equally valid for everyone. That is the first and main expectation of people facing the Judiciary and nothing else. Independence means not only of the courts as the authorities of the third state power, but personal independence of each single judge as only guarantee for the citizens to get the confidence that they will have a just, fair and impartial trial and judgment when they are coming before the court in search of their rights. Therefore, independence is not only a prerogative of the judges, but the most important privilege of people who want to live in peace, protected by law. Courts and judges are only administering this privilege in favour of the people. If you are going to reform the courts you are not doing it for the judges, you only do it for the citizens of your country."²²

Corruption and abuse of office in the Judiciary destroy all that the learned President of the Association said.

In the Report of the Advisory Panel of Eminent Commonwealth Judicial Experts, which the author had the honour to lead in Kenya, it was observed:

"We heard consistent complaints about the integrity and the competence of the Kenya Judiciary. We have been told by senior members of the legal community and by representatives of civil society that corruption is widespread. Corruption takes various forms. Bribery is the most obvious. It hardly needs to be stated that offering or accepting bribes in relation to judges, magistrates or court officials is completely inconsistent with the law and represents an assault on the integrity of the judicial system. Another form of corruption is the exertion of political pressure or influence on a judge or a magistrate to decide a case other than in accordance with the law and the evidence before the court. Regrettably, we must report that we have been told by virtually everyone to whom we have spoken that both forms of corruption are common in the courts of Kenya."²³

21 The Institution is severely damaged if such rumours are spread by members of the Executive or Parliament.

22 At its Annual General Meeting: The recent Kenya experience where alleged corrupt judges and magistrates were publicly named and asked to resign without being given the right to be heard or the details of the charges against them has been severely criticized as being against the rule of law and international law and practice.

23 Released 17 May 2002 at page 12.

In a report, published by the office of the Inspector General of the Government of Uganda, it was found that the police and the Judiciary, especially in its lower ranks, were amongst the worst corrupt institutions in the country.²⁴

Yet, the Judiciary is the one bastion where citizens may go to challenge the arbitrary or oppressive actions of the state. It is the safe haven where most impoverished or abused citizens may find support for their legal rights when they conflict with the rich and the powerful in society.²⁵ A court of law is the forum where corrupt public and government officials and errant citizens alike may be brought in order to condemn their misconduct and impose punishment for their abuse of public trust and misbehaviour. Therefore, where there is corruption involving a court or a judicial officer, justice cannot be done with impartiality. Where there is no impartiality, there is no hope that citizens will be treated with impartiality, fairness and compassion. It is because of judicial independence and impartiality that judges are given such a privileged position in society and that is why they and judges and other judicial officers are treated with deference and respect in their courtrooms and elsewhere. It has been said that a judge occupies an enviable position in society. He or she is enveloped by an aura of dignity and is always on a pedestal. That position has to be jealously guarded.²⁶ Consequently, where corruption occurs in the Judiciary, it is the worst form of abuse of public trust, because honesty, integrity and fairness are what entice citizens to seek recourse in the courts. Society should never permit its citizens to be ambushed in the courts by tolerating corruption therein whether such corruption is monetary or political. Political intimidation is a form of corruption. Political attempts to intimidate the Judiciary have been met with courageous stands from the judges themselves.²⁷ Some threats against judges have been uttered publicly by the top leadership of various Commonwealth countries.²⁸ In some countries, such as Zimbabwe, intimidation of and threats against the Judiciary can and have had devastating effects. Thus, Jan Raath writing about Zimbabwe, ominously observed:

"In 2001, Zimbabwe's Judiciary was one of the most highly regarded in the commonwealth, particularly for its compassionate interpretation of constitutional rights.

24 *Supra*.

25 In the Report of the Advisory Panel of Eminent Commonwealth Judicial experts, *supra*..

26 see Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence adopted 19 June 1998.

27 The Chief Justice of Uganda and the Principal Judge have recently had to take a strong stand against such threats. See the Monitor Newspaper, 7 February 2006.

28 The honour accorded to judges is for the benefit of society and not of the judge personally. See Neelan Tiruchelvam and Radhika Coomaraswamy: *The Role of the Judiciary in Plural Societies*: Francis Pinter (publishers), London, 1987.

134 *Kanyeihamba's Commentaries on Law, Politics and Governance*

In that year, Robert Mugabe appointed as Justice Minister, Patrick Chinamasa, a key figure in his "War Cabinet" to silence the growing demand for political change and greater liberty.

Since then, the Judges have undergone an onslaught of unrelenting intimidation, harassment and blatant attempts at bribery. It has worked and driven out nearly all of the judges who maintained their independence in an entrenched and largely corrupt or pliant bench.

The public has lost faith in the Judiciary.²⁹

Jacob Mafume, a Board member of the Zimbabwe Lawyers for Human Rights says: "It (The Judiciary) is becoming an irrelevant factor. The Judiciary is contributing to its own sickening. There are certain judges trying against all odds to ensure that justice is delivered, but their work is overshadowed by the decay in the system."³⁰

This contrasts sharply with the position in Uganda where the Judiciary, especially in the past, where, with a few exceptions steadily stood its ground and performed its functions bravely despite scathing criticisms and intimidation from outside forces. For this reason and despite disclosures of corruption against some judicial officers, Ugandans have continued to declare and maintain their faith and confidence in the Judiciary.³¹

Political attacks on the Judiciary have taken many shapes including personal abuses of individual judges and contemptuous executive attempts to reject courts' judgments.³² One judge was allegedly visited in his chambers and personally abused by an army officer who supported the incumbent government. The junior judicial officer who allegedly led the military man to the judge in question was promoted to the bench.³³ In their attempts to pack the courts with their own choices of judges, those in the Executive who are so minded have now turned to influencing the Judicial Service Commission in the exercise of its independent powers and functions.³⁴ This is the worst form of corruption for it will bring to the Judiciary persons who are not necessarily qualified to hold judicial office.

29 Reported in the Guardian of London, 5 September 2004. In a number of Commonwealth countries, judges have been murdered, imprisoned, dismissed or forced into exile because of their respective defences of the rule of law and human rights. In Uganda, Chief Justice Kiwanuka was taken from his chambers by Amin soldiers and murdered.

30 In the Guardian London, op.cit.

31 The East African Newspaper, May 2003.

32 The Ugandan and Zimbabwean Presidents, respectively, after delivery of court decisions each disliked.

33 This was as a result of the Constitutional Petition on the referendum.

34 The former Minister of Justice and Constitutional Affairs (Janet Mukwaya) was reported in the New Vision Newspaper as saying that she had rejected a judge recommended by the Judicial Service Commission for appointment and her Ministry had instead recommended the appointment of another. The Minister and her Ministry do not have such powers or functions.

The composition of the Judicial Service Commission in many countries suggests that they are independent and act in accordance with the provisions of the constitution. However, the evidence on the ground suggests the contrary.³⁵

A combination of a weakened Judicial Service Commission and *inertia* in the Judiciary itself has meant that not only are many allegations against corrupt judicial officers not investigated but also unsuitable judicial officers are being recruited. It takes a long time before some of these allegations are investigated and even then, the findings and recommendations from the investigators are hardly responded to or implemented. Where an allegation of corruption is levelled against a judicial officer, the allegation should be investigated and resolved in the shortest possible time and not be postponed indefinitely. To dither and hesitate in such a situation further undermines the Judiciary and the integrity of those who work in it. It is not often appreciated that it is easier to appoint and hire than to discipline and dismiss senior public officials, especially judges.³⁶

9.6 PROFESSIONALS AND CORRUPTION

At one time, in England, where most of the Commonwealth member states inherited the term, there were allegedly only three professions recognized. The people who qualified to be called professionals were those who worked in the church, the law and prostitution. The latter is still popularly known as the oldest profession, and the three are still practised today. However, nowadays all activities in which human beings are engaged, whether of a production, service or entertainment nature and whether performed or acted honestly or dishonestly, are described by those who work in them and others as professionals. For instance, it is not uncommon to hear the term, professional thief.³⁷ Following are a few observations on the professions which impact on public administration and affect the lives of citizens. They include the three already mentioned and others such as medicine, the sciences, teaching, engineering, accountancy, banking and commerce, to mention but a few.

It should be noted that in order to qualify to work in or run the affairs of Parliament, the Executive, the Judiciary or their agencies or in public administration generally, the candidate must show evidence that he/she is qualified,

35 In a report to the Judiciary by the Chairman of the Judicial Service Commission, Justice S. Manyindo, October, 2005.

36 Uganda Constitution, Article 144.

37 E.g. R.V Hayes, Criminal Law, Rev. November 1987 at 788.

registered or recognized by any of the established professions.³⁸ In consequence, the impact of such persons and the manner in which they perform their duties may depend on the type of professional qualifications and the degree of honesty imbued in them at the time they qualified or during the practice of their profession elsewhere before they were admitted into the public service. It cannot be overemphasized that if a person who is known to have practised corruption elsewhere is appointed into another establishment or institution, the tendency to continue the corrupt practices may become even greater, since that person will have gained considerable experience in the art of corruption without having been caught or prosecuted. Most of the remarks that follow will be related to the legal profession.³⁹

9.7 THE LEGAL PROFESSION

In the majority of important cases that call for resolution and adjudication, litigants or parties hire the services of members of the legal profession and instruct them to represent them. The functions and services to be rendered by members of the legal profession are deemed so important for good governance, the rule of law and the welfare of the people that laws are made from time to time to regulate the conduct and behaviour of members of the profession to ensure that they charge reasonable fees and that those of them who break the law and the rules of professional etiquette are disciplined and if need be, barred from practising again.⁴⁰

The legal profession is often called the learned profession. Members of other professions and lay persons often wonder why only lawyers are called the learned when other professionals such as doctors, engineers, accountants, scientists, philosophers and priests spend years of hard study and achieve brilliant results and excellent qualifications and yet no one calls them learned. The answer is simple. There is no other profession or discipline, whether it be in the sciences, arts, religion or philosophy, which is more concerned with so many facets of human endeavour than the law. It is only the lawyer who is trained and supposed to be endowed with certain faculties and techniques to enable him or her to examine analytically and critically, the works, deeds and opinions of members of other professions and disciplines such as those of doctors, scientists, engineers, accountants, social workers, politicians, astronomers, journalists, intellectuals, religious gurus, professional thieves, forgers, prostitutes, cranks and fanatics and,

38 To be appointed a judge of the High Court in Uganda one must be an advocate of at least ten years standing and have both academic and professional qualifications.

39 See: G.W.Kanyeihamba: *The Constitution and Government of Uganda*, op.cit. pages 412-429.

40 The Law Society Act of Uganda (Chapter 276).

pass judgments which are perfectly rational and understood by the rest of mankind including members of the particular profession or discipline in which the judgment is passed. The reverse is not however true or sustainable when it comes to the other professions. The legal profession is often called the honourable profession and its members are subjected to a strict code of conduct and etiquette, even though as we shall see, not all of them adhere to them.⁴¹

Ideally, professional standards must be kept by all in society, but in my view, nowhere else are these standards of more paramount importance than in six professions which intimately affect the human being in its welfare, living and health, namely politics, public service, the medical profession, the legal profession, accountancy and religion. The first and second affect one's existence and human rights, the third controls one's health, the fourth and fifth control one's living and property while the fifth affects and controls one's will and spiritual wellbeing.⁴²

In relation to the legal profession, there have been complaints against advocates who charge excessive fees, embezzle clients' money, advise clients to file or defend suits when the facts stated do not actually disclose causes of action or defences in their favour. Some advocates or their agents to the knowledge of those advocates have been caught or reported touting for clients which is prohibited by the rules of the profession.⁴³ There have also been allegations of incompetence, misconduct and dishonesty reported against several lawyers and law firms. Reported also are incidents where corrupt lawyers secretly agree with clients to share the booty of litigation which encourages those lawyers to resort to illegal traits in order to "win" the case that is expected to yield the compensation from which they will partake their share.⁴⁴

The lawyer is taught to seek the truth and seek it in a legal manner. There is also the principle of confidentiality between a lawyer and his or her client. The lawyer who accepts a brief from a client is bound by professional ethics to treat what passes between them with the strictest of confidences unless to do so would constitute a crime or unless a client agrees to the disclosure of the information especially if such disclosure is in his or her interest. Any breaches of these rules constitute professional misconduct.⁴⁵

41 *infra*.

42 This is not to belittle the importance of the other professions but the ones enumerated are much more closely associated with the subjects matter discussed in this essay.

43 See: G.W.Kanyeihamba; *Constitutional Law and Government in Uganda*, op.cit, pages 416.

44 Periodic reports to the Law Council meetings in Uganda.

45 Advocates Act, 1970, section 83.

One of the commonest reported corruptions in the legal profession is overcharging fees and expenses. Several practitioners have been reported as charging excessive fees basing their reason on the lie that they need more money to pay a bribe to the presiding judicial officer who will rule in their favour. Others have colluded with counsel representing the successful party in a litigation so that they will not oppose the excessive fees claimed by the latter under a secret pact that when those fees are paid, the other counsel will receive a certain percentage of whatever has been paid. In cases where litigants are knowledgeable and feel that they have been overcharged by lawyers, they have opportunities to challenge those lawyers and have the costs taxed by a registrar of the Court in which the case was finalised. The registrar becomes known as the taxing officer or master and he or she may apply the rules of Court to reduce what he or she believes to be too excessive. However, it is also suspected that some registrars do collude with corrupt lawyers to keep the costs very high so that they too share in the costs. Further, there are other reports that state lawyers and some ministers of government get involved in conspiracies to cheat the state and the people by having cases settled out of court. In exchange for the “services rendered”, the same lawyers or/and ministers become beneficiaries of those settlements. In all cases, there are rights to appeal to courts of law which rights are rarely exercised.⁴⁶

9.8 CORRUPTION IN OTHER PROFESSIONS

Considering that all the above descriptions encompass the whole fabric of society and that presently corruption and abuse of office are rampant, it would be something short of a miracle if the same phenomena were not to be found in all the other professions. Precedents, press reports and reports of public commission of enquiry set up by governments to investigate and report on these other professions indicate quite convincingly that what occurs in the legal profession is also evident in other professions. Doctors compromising their professional ethics for favours and payments, engineers designing defective bridges and structures, some of which have collapsed and caused fatal accidents, can be best investigated and reported on by members of those respective professions and disciplines.⁴⁷

A surveyor who is engaged by a seller of land may not bring out the same measurements of the area of the land to be sold as that reported by a surveyor who is acting for the buyer. On the face of it, this appears to be impossible, but in actual

46 GW Kanyeihamba, op.cit.page 447 n.44.

47 See Erick Kohler: ABC Dictionary for Accountants.

fact it has happened.⁴⁸ Estate valuers bring out different prices of property and houses, depending on whether they are acting for the buyers or sellers. In one such case, one well-known property magnate in Uganda recently remarked, that a Ugandan valuer's pricing of any property whether urban or rural, is not worth the paper it is written on.⁴⁹ Accountants and auditors often come up with conflicting reports depending on which party they are representing in the investigations and what their respective clients wish.

Nevertheless, every member of any profession is supposed to be qualified and skilled in his/her profession. Professionals hold themselves up as experts in their chosen subject. They assume a moral obligation to act and perform honestly, to the best of their ability, and to the standards demanded by their profession. Professionals present themselves as adhering to the high standards or ethics and integrity of the profession and in this regard, they are expected to perform the functions and duties of their particular calling correctly and diligently. The rules and ethics that govern most other professions are similar to those that have been examined under the legal profession and their observance is rigidly ethical. Any wilful neglect or violation of them results in blameworthiness and should lead to discipline and possible legal liability.⁵⁰

Common to all professions is the importance of using up-to-date information and technology. Information is knowledge and a necessary tool of understanding, revision, analysis, plan and action. Equally important to all professions is the ability and power of the community to constantly monitor their performance and to weed out those who abuse the name or ignore the techniques of the profession and who bring its name into disrepute. Such persons must be suspended, severely disciplined or removed in order to save the name and integrity of the true and honest professionals.⁵¹

9.9 FIGHTING CORRUPTION

In free and democratic states that respect human rights, the Press is regarded as the fourth estate, the other three being Parliament, the Executive and the Judiciary, and not necessarily in that order as far as freedom, the rights of the individual and

48 The respective Reports of the surveyors who acted for the seller and buyer, in the land sale, at Ddewe Country Farm Ltd, 2004.

49 Mr Karmali of Mukwano Group of Companies, in an interview with the author, 17 October 2002.

50 Eric Kohler: op.cit.

51 In almost every profession, it is the acts and behaviour of a few which discredit the majority of its members and the profession itself.

the rule of law are concerned.⁵² The Press has been quite courageous, influential and vigilant in researching into allegations of corruption and abuse of office by public officials. It has gone even further and actually named and reported extensively on suspects, culprits and their victims. Unfortunately however, the responses of government, the police and their director of public prosecutions to the findings of the Press have generally been poor and occasionally hostile. Hardly any adequate steps have been taken to remedy the wrongs exposed in the Press. Usually, there are expressions of regret with the usual rider that concrete evidence is not available to enable the authorities to proceed any further.⁵³

In every state, there are constitutional and legal provisions, rules and regulations, giving ample opportunities and powers to appointing authorities and those vested with powers of discipline and dismissal, to effectively reduce if not eliminate altogether corruption and abuse of office. However, it can be generally observed that the consideration of political, ethnic, tribal and nepotistic interests often relegate the fight against corruption to the lowest priority, leaving corruption to be regarded as a mere nuisance and embarrassment which may one day wither away through religion and the prerogative of mercy.⁵⁴

9.10 THE MAJOR WEAPON AGAINST CORRUPTION IS CIRCUMSTANTIAL EVIDENCE

When people apply for jobs in government, they are required to give personal details, their age, marital status, academic and professional qualifications accompanied by testimonials of experience and performance in work. They are asked to give names of persons who know them and who can give references and vouch for their character, honesty and reliability including the ability to receive, take care of and keep in safe custody, their employer's property.⁵⁵ Unfortunately however, once hired the qualifications and terms and conditions for which they were hired seem to evaporate, and new conditions emerge for which anyone may be disciplined or removed from office.

The new overriding ground for prosecution is the availability of watertight evidence; without which a public official who has committed a serious offence or caused immense loss to the nation cannot be convicted of a crime. The case of corruption becomes provable beyond reasonable doubt. Without such conviction,

52 Robin Callender Smith; *Press Law* 1978, Sweet and Maxwell, London.

53 The DPP exonerating a suspect in a corruption case reported in *New Vision*, 22 January 2005.

54 In several cases, the present Government of Uganda has publicly pardoned the corrupt and abusers of office on several occasions.

55 Standard forms of advertising positions of employment in institutions, newspapers and other publications.

no-one can be disciplined, let alone dismissed from office. Without such conviction, most guilty public employees remain in their posts of employment or may be transferred to other stations or offices, without loss of face or benefits. Apparently, no one wishes to recall the essential qualifications, presented by or on behalf of the culprit when she/he originally applied for employment and without which the job would not have been offered by the employer. In reality, a verdict of not guilty does not necessarily mean that the acquitted is innocent or has not behaved in a way that justifies discipline or dismissal. All that can be said about acquittal is that the prosecution has failed to prove the case against the accused beyond reasonable doubt. Indeed, under Scottish Law, there is a third verdict added to those of guilty or not guilty. That verdict is “not proven”, when it is said that the guilt or the accused has not been proved by the prosecution and as one experienced Scottish Judge said of that verdict: *“it means that the prosecution have failed to prove the case against you beyond reasonable doubt, but we know you did it. Do not do it again!”*⁵⁶

In an English criminal trial, the police did not have any direct evidence against the accused except the knowledge that he had been the husband of various women who apparently died tragically and under similar circumstances, shortly after he married each of them. In the first case, the accused carefully selected and married a wealthy widow. He took her on a holiday to a seaside resort and chose a hotel with a bathroom that could be locked from the inside. One day, while the man had taken a walk, the wife mysteriously drowned while having a bath. Apparently, she had locked herself in the bathroom before going in the bath. The husband raised the alarm and independent witnesses noticed quite clearly that the deceased appeared to have locked the bathroom door from the inside. The door had to be broken down before the police could get to her body. It was regarded at that time as a tragic accident.

Over a period of years, two subsequent wives died under similar circumstances. Eventually, the police managed to piece together all the evidence and compare the circumstances relating to the deaths of the three women. They decided to indict the husband for the murder of his wives. As was observed at his trial, there were no eyewitnesses or any direct evidence to connect him to the murders. He was nevertheless convicted of murder and sentenced to death. In convicting and sentencing him, the learned trial judge having satisfied himself that the prosecution had proved their case beyond reasonable doubt by the circumstantial evidence presented at the trial, observed:

56 The Deputy Sheriff of Sterling in Scotland at the Commonwealth Triennial Conference of the Association of Magistrates and Judges, Edinburgh, 1999.

142 *Kanyeihamba's Commentaries on Law, Politics and Governance*

"Losing the first wife in the circumstances shown would be a tragic accident. Losing a second wife under similar conditions seems to me to be carelessness. Losing the third wife in the same way is definitely murder."⁵⁷

Taking the evidence as a whole in that case, there is only one conclusion that can be drawn. The husband, who must have known how each victim was murdered, could not offer any plausible explanation as to how the women had died, and therefore must have been guilty of their murder.⁵⁸ In Commonwealth jurisdictions there have been many court decisions reached on the basis of circumstantial evidence.⁵⁹ It was pointed out earlier that corruption is committed in secret in a manner that does not welcome observers or witnesses. Moreover, the culprits do not willingly admit to having committed offences. It is therefore only logical and practical that those who are serious in fighting against corruption should utilize circumstantial evidence. A lot of facts and evidence on corruption and abuse of office have been compiled and reported in the media and elsewhere against named individuals working in government, organizations, companies and institutions, to enable the appointing and disciplining authorities to act decisively and take effective measures. Unfortunately however, this evidence of exposure has not been matched with resolute determination by those authorities.⁶⁰

The commonest and most obvious type of circumstantial evidence is the manner and speed with which public officials accused of being corrupt or having betrayed the trust the public had in them, have acquired a lot of wealth and property. Relatively young and recently employed public officials and government cadres suddenly become rich and acquire property far in excess of their incomes and allowances.⁶¹ Hordes of such employees in government, public corporations and institutions, such as the revenue authority, public financial institutions, the police and other state security organizations, have been exposed. It is inexplicable how these novices, who were paupers before their recruitment into the public service, suddenly become the wealthiest members of society. They acquire and own executive mansions, expensive vehicles, land and other numerous properties of quality, never dreamt of by their senior but honest colleagues who may have

57 Popularly known as the path murders. See *Cross R: on Evidence*; Butterworths and Co. (Publishers) Ltd. 1958.

58 See *Phipson's Manual of the Law of Evidence*, (12 ed) Sweet and Maxwell, London, especially, Chapters 4 and 7.

59 Criminal Appeal number 35 of 2002, Supreme Court of Uganda, (UR).

60 The reports in many Commonwealth countries suggest reluctance on the part of the authorities to act: see Law Society of Kenya: *Impunity*, Chapters 2 and 4.

61 See the Sebutinde Commissions' Reports on Corruption in both the Uganda Revenue Authority and the Police, Government Printer, Kampala.

started working before the new young rich became employable. Recently, in Uganda, bodies such as the office of the Inspector General of Government, the Ministry of Ethics and Integrity, civil society organisations and state investigating agencies as well as special commissions of enquiry have, between them, unmasked the culprits behind the new political dogma of support the system which appointed or is sustaining you and you will corruptly become wealthy quickly and receive watertight protection. Unfortunately, this dogma appears to be working well in many Commonwealth countries.⁶²

There have been reports of government ministers and other high officials of state each owning several mansions in highly desirable residential areas. In addition, the same group of officials are said to own or have substantial shares in diverse businesses and enterprises from which they get undisclosed income notwithstanding the provisions of the leadership codes. All these facts are well documented or known to the appointing and disciplinary authorities. The Press, lawyers, colleagues and members of the public have bravely named individual culprits and disclosed evidence of wrong-doing. The informants have bravely promised to testify in the event of charges being brought against the suspects they named.⁶³ In several cases, the culprits themselves have admitted that they committed the offences of corruption and abuse of office. In one notorious incident, the culprit confessed to all and sundry that he had taken a bribe. Those who came to know about the confession included the appointing and disciplinary authority. The confession was in writing. The persons to whom the confession was made reported the names of the parties and details of the confession to the appropriate authorities. A year passed without anything being done. When recently, the informants read in a magazine that the confessor was not only still working normally but was continuing to indulge in his favourite pastime of bribe taking they reminded the disciplining authority of their earlier communication about the same corrupt official. It is only since that reminder that the authority in question has, almost grudgingly, written to say that the matter will be investigated. It leaves one wondering what kind of investigations will be carried out and with what results and action, if any. This case typifies many official responses to incidents and reports of corruption.⁶⁴

62 See: Ghai, Yash: *The Theory of the State in The Third World and the Problematic Constitutionalism in H.J. Steiner (ed) International Human Rights in Context*, Clarendon Press, 1966.

63 The Monitor Newspaper, 17 April 2004.

64 The allegation of corruption against Jeremy Ereeme – Grade II Magistrate: Correspondence between the offices of the Chief Justice and Chairperson of the Judicial Service Commission, Uganda 2004 – 2005.

Reports suggest that in some cases the corrupt are vigorously pursued by the state while in others they are pardoned.⁶⁵ To maintain silence or to pardon certain groups of offenders while directing that others should be investigated further or punished, and to do so on the basis that the culprits are either useful or hostile respectively, to the incumbent government, cannot in any way advance the national campaign against corruption or abuse of office. Once a country adopts and practises a policy of discrimination and favouritism between one group of alleged criminals and others for any reason whatsoever, the war against corruption and abuse of office is lost notwithstanding any expressed rhetoric to the contrary. Coupled with the reluctance to prosecute, the war against corruption and abuse of office, the policy of depriving those found guilty of corruption of their ill-gotten gains has never been taken seriously or implemented in many countries. There can be no doubt that bank accounts, property registers, companies' returns and investigations would reveal the required evidence needed not only for the disciplining of the culprits but also for forfeiture to the state of the property and wealth illegally or corruptly accumulated.⁶⁶

The weak or lukewarm attempts of the appropriate authorities in government to respond effectively to allegations of corruption and abuse of office in public affairs has already been mentioned.⁶⁷ In the past, there would have been a barrage of public denunciations to indicate that those authorities were indeed genuinely concerned with these twin evils whose combined result is not only to undermine but to discredit the government of the day. However, subsequent policies, pronouncements and decisions have suggested reluctance on the part of those concerned to disturb, let alone discipline, the persons identified as corrupt or abusers of public office.⁶⁸

9.11 STRENGTHENING THE RESOLVE AGAINST CORRUPTION

There is need to establish institutional structures and transparent procedures which will encourage the elimination of corruption and false allegations of corruption from the institutions of government in order to enhance the reputation, impartiality and fairness of those institutions which will in turn enhance public confidence in them.

65 Courts have the powers to order both production and examination of papers and accounts.

66 Inspectorate of Government: Reports to Parliament, July 1997, April 1998 and January-June 2001, Uganda.

67 *Supra*.

68 The IGG reports: 2001, 2002, 2004; Uganda Parliament Library.

Some years ago, allegations of corruption and abuse of office in the British Parliament became so common and serious that steps were taken not only to enquire into them and report but also to propose methods of elimination. In consequence, the Nolan Committee was set up and made a number of findings and recommendations.⁶⁹ The Committee offered seven principles which should govern activities in public life. These are:

- (1) **Selflessness** – It was recommended that holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family or their friends.
- (2) **Integrity** – holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.
- (3) **Objectivity** – in carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.
- (4) **Accountability** – holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
- (5) **Openness** – holders of public office should be as open as possible about all the decisions and actions they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.
- (6) **Honesty** – holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest; and
- (7) **Leadership** – holders of public office should promote and support these principles by leadership and example.

In addition, the Committee recommended that Members of Parliament should avoid conflicts between personal and public interest and should they inevitably occur, they should resolve them in favour of public interest. Members should conduct themselves in a manner that maintains and strengthens the public trust and confidence in the integrity of Parliament. Members should not accept bribes to influence their conduct as Members of Parliament, and this includes fees, compensation or reward in connection with the promotion of, or opposition to any Bill, Motion, or other matter submitted, or intended to be submitted to Parliament or any of its committees as such actions conflict with the law of Parliament. Members should register their interests in accordance with the rules of Parliament. No Member should act as a paid agent of any power, body or

⁶⁹ British Parliament, Library.

organisation for any proceedings before Parliament. No improper use should be made of any payments or allowances made to Members of Parliament for public purposes and the rules of Parliament which apply to such payments or allowances must be strictly adhered to.⁷⁰ Lastly, Members should not use information gained from Parliament whilst they are Members thereof, for financial gain.

It has been found useful to reproduce or paraphrase these British guidelines for public office holders because the same should be adopted to govern public office holder's elsewhere whether they be members of Parliament, ministers of public servants in Parliament, the Executive or the Judiciary. Uganda had gone further in this area by creating the office of the Inspector General of Government who investigates reports and sometimes prosecutes the corrupt, abusers of public office and persons who indulge in maladministration generally. The major problems the office of the Inspector General of government has faced are the hostility, resistance towards and, sometimes total disregard of its findings and recommendations from all and sundry including some members of the Executive.⁷¹

From time to time, the Press have investigated and reported on several holders of public office who have indulged in corrupt practices, or who have the "*get rich quick*" mentality and do so, or who are connected with shoddy or corrupt schemes and organisations, the acts and behaviour of which are contrary to the leaderships code.⁷² Many such reports are often ignored by those concerned, and those which are acted upon yield very few positive results. Society can no longer tolerate a situation where holders of public office who are supposed to act impartially and justly in the public interest have enjoined that interest to one of theirs, their family or friends to the extent that the two have become inseparable.

The proper exercise of executive power means a radical departure from the prevailing attitudes, whether official or unofficial, which appear to condone wrong-doing and reward corruption in public administration. A radical transformation of public service and accountability is long overdue in Uganda. It is not often appreciated that failure to exercise executive power, or to exercise it wrongly, is as bad as its excessive use or abuse. It is necessary to look at official and public attitudes towards corruption, which is rampant in many Commonwealth countries, and where there has been partial or total failure to exercise executive power to fight against this public menace.

70 *Ibid.*

71 *Supra.*

72 See Haroub Othman of the University of Dar es Salaam; in an interview published in the East African Newspaper: 10 March 2005.

CHAPTER TEN

OBSTACLES TO AFRICAN DEVELOPMENT

(A speech to the Conference at Makerere on Global Development attended by the World Youth – President Museveni was Chief Guest and this writer was Guest Speaker).

Over the years, there has been a tendency amongst old generations to marginalize the youth.¹ This tendency is misconceived and should be discouraged. Some sentiments that have been expressed about the youth may be recalled:²

Youth is a quality, not a matter of circumstances.

Youth is not an age, it is a state of mind.

Age should think and Youth should do.

Youth is a predominance of courage over timidity, of appetite for dventure over the love of ease.

Youth is the infinite wisdom of inexperience.

It is always a mistake to try to impose the rules of an older generation on a new age.

The youth are the future and hope of all mankind.

10.1 THE WISDOM OF AFRICA

Similarly, modern literature particularly that intended to appeal to western readers and admirers hardly refers to African culture or wisdom.³ It may be useful to cite some of it in this short paper. It is also true that many scholars with anxiety to be appreciated outside Africa tend to overlook the richness and acumen of African thinkers and writers. Let us allude to some of them including contemporary ones.

1 See "New Vision" 22 February 2006.

2 Cited from diverse sources.

3 See Shadrack B.O Gutto: *The Rule of Law, Democracy and Human Rights: Whither Africa?* in E.A.J.P.H.R Volume 3 number 1, page 130

An ancient African saying on the Rule of Law: A monkey should not determine the affairs of the forest (*The concept that no man should be a judge in his own cause*).⁴

Mwalimu Julius Nyerere: A member of society will be entitled to a piece of land on condition that he uses it. Unconditional or “freehold” ownership of land which leads to speculation and parasitism must be abolished.⁵

Yoweri Kaguta Museveni: Fellow countrymen and women, we owe it to our country, to our children to unequivocally define the national interest and to achieve primary consensus. The national interests must always override individual or sectional interests. Peace is another core national interest and the citizens of Uganda must not do anything to threaten it. It is in the national interest that the rule of law is maintained. All of us should abide by the law and accept the verdicts of the Judiciary, if we can achieve consensus on these core interests, then our nation will survive and prosper.⁶

Tumusiime Mutebile: Politicians are the problem, not poverty figures.⁷

Chief Ijebu-Ode of Nigeria: I conceive that land belongs to a vast family of which many are dead, few are living and countless numbers are yet unborn.⁸

Justice Aguda: The fact of course is that most governments founded upon the wielding of the gun, or upon palpable illegality can hardly be expected to have much regard for legality or the rule of law ... most principles of legality and the rule of law are ridden rough-shod as if they do not exist or as if they are obstacles that have to be crushed. In these circumstances, the judiciary being the watch-dog of these principles could not hope for much hearing, not to talk of affection.⁹

Dr Kwameh Nkrumah: Seek ye the political kingdom and all shall be added unto you.¹⁰

4 Cited by GW Kanyeihamba in: *Constitutional Obligation in the Developing Countries in Marasinghe and Conklin (eds). Essays on Third World Perspectives in Jurisprudence*, Malayan Law Journal Pte Ltd, 1984, page 31.

5 Nyerere's Writings and Speeches, Reprint, 1952-1965, Dar es Salaam, 1964, page 123.

6 In *Sowing the Mustard Seed*, McMillan, London, 1992.

7 Quoted in the Monitor Newspaper, 30 September 2005.

8 Cited in GW Kanyeihamba PH.D thesis: *Law in Urban Planning and Development in East Africa*; Warwick University, 1974, at page 135.

9 A.Akinola Aguda: *The Judiciary in a Developing Country in Essays on Third World Perspectives in Jurisprudence*, op. cit. page 143.

10 In Ali Mazrui's *Nationalism and New states in Africa From About 1935 to the Present* (with Michael Tidy), Heinemann, London, 1990.

Dr GW Kanyeihamba: In Essays on Third World Perspectives in Jurisprudence, 1978, “An important aspect of the new education in public administration is to convince leadership that neither it nor anyone else has a monopoly of the right policies or solutions. Leaders need to appreciate and accept political defeat and loss of power as attributes of democracy and constitutionalism.”¹¹

In this paper, I discuss man-made obstacles which have retarded the development of Africa and kept many of the Continent’s countries in abject poverty and reduced them into the ghettos of the world.¹²

10.2 THE OBSTACLES

Many African leaders have failed to forge and create nations out of the pre- and colonial existence. This has resulted in the concepts of self-preservation and aggrandizement with the associated myopic loyalties and services to the family, the clan, the tribe and immediate supporters, devoid of nationalism and patriotism. Partly because of their preoccupation with these pastimes and partly because of the ineffectiveness of the opposition, many African leaders do not appreciate that the desire to cling to office is an admission of their failure to have evolved and nurtured a culture of a belief in the rule of law, in democracy and in peaceful political transition and succession.¹³ These are the attributes of peaceful co-existence, of stability and of development. Many African leaders and their immediate supporters have still not seen the danger that results from prolonging themselves in positions of leadership with blinkers on that do not enable them to see and appreciate the contributions of fellow compatriots, whether of the past, the present or the future and that this inability is a major contributory to the instability that characterizes much of Africa to-day.¹⁴

11 Constitutional and Political History of Uganda, From 1894 to the Present, CPH, Kampala, page333.

12 Non-made ones such as earthquakes, droughts and disease have had an equally devastating effect on the Africans and African development.

13 Generally see; Samuel O. Gyandoh, Jr. *Popular Justice & the Development of Constitutional Orders in Sub-Saharan Africa in Third World Legal Studies*, 1989; The Valparaiso University Law School, Philadelphia, PA. 19122, U.S.A

14 Just before President Yoweri K. Museveni declared that he intended to have the 1995 Constitution amended to lift the limitation on how long a person can be President in Uganda, he stated that he was the only person in the country with a vision.

10.3 THE DEPENDENCY SYNDROME

There is a dependence syndrome in African States. African leaders and beauracrats continue to visit world capitals with begging cups in hand and return home in what they deem to be their triumphs with knowledge and pride that the rich nations of the world they visited have recognized their poverty and misery and handed them crumbs from their richly endowed tables.¹⁵

Thus, Professor Ali Mazrui, the well known African scholar, writer and broadcaster writes:

“In global terms, the African state has got increasingly marginalized, being pushed into the ghettos of the world systems. Like Africa’s refugees, many African states, were already living, at least partly, on handouts before the 1990s. It has become worse since then. Just as a disproportionate number of refugees in the world are in Africa, a disproportionate number of disabled and impoverished states are also in Africa.”¹⁶

10.4 IMPACT OF FOREIGN AID, ADVISERS AND PLANNERS ON AFRICAN DEVELOPMENT

Some thirty years ago, I critically examined the influence and impact of aid, expatriate advisers and planners on African planning and development. This was during the preparation of my doctoral thesis.¹⁷

I discussed a number of theories about the subject. The first is the belief by many Africanists that the only way planning and development in Africa can have any meaningful purpose is if the plans are originated and implemented by the Africans themselves. This is regarded as the ideal position when local circumstances, talents and finance are predominant in the planning and development of societies in Africa.¹⁸ This phenomenon is equated with the right to self-determination as against three counter-arguments. In the first place, whoever is responsible for the transformation of society will always encounter pockets of resistance as a result of traditionalism, vested interests or simply human nature which tends to be impervious to change. In the second place, there is the realization that problems of development are pretty universal and therefore must be examined and solved in the context of the world. Prevailing attitudes and needs ought to be tackled at both the national and international levels. The success and failures observed elsewhere may lead to a reappraisal of situations at the local and national levels. Modern supra-

15 B.E. Harrell-Bond: *Imposing Aid*: Oxford Medical Publications, OUP, 1986.

16 In a mimeo presented at Coventry University Conference on the Marginalisation of Africa, 1999.

17 op.cit. from page 355.

18 see *African Affairs*, Volume 94, number 374, January 1995.

national institutions and organizations and inter-state dependence have meant that a country has often to look beyond its own territory to find solutions to its domestic problems. Nationalism gives way to international knowledge and assistance.¹⁹ The only condition is that such knowledge and assistance need to be selected and applied contextually so as to meet local conditions and circumstances.

In the third place, a study of Africa's problems of development, the analysis of its political and economic advancement as well as the realization of impatience on the part of its inhabitants, tend to show that changes on the Continent are likely to be more revolutionary than evolutionary.²⁰

It has been estimated that 95% of all research activities of the world are concentrated in some 35 developed nations. Of the remaining five percent, only a small fraction is undertaken on the African Continent and of that minute fraction, the biggest role is played by expatriate advisers and scholars hired, largely through foreign aid.²¹ Yet research is a most vital component of development. Thus, the Executive Secretary of the Economic Commission for Africa, himself an African observed:

"Basic or fundamental research leads to the discovery of new development possibilities, and better ways of utilizing existing resources. It also facilitates better understanding of technological processes. Thus, the knowledge derived from basic research forms the raw material out of which an understanding of the problems of applied research can be derived. Applied research including adaptive research, enables knowledge and techniques to be imported, and adopted to local conditions."²²

It is only recently that African governments have begun to appreciate the importance of research for their development policies and schemes as evidenced by the establishment and facilitation of national research councils to coordinate their respective research efforts.²³

Some expatriate scholars and researchers have done commendable work and the findings of their research have been useful.²⁴ Others have tended to be

19 Tandon Y. Technical Assistance, Administration and National Development in Uganda: Working Paper on Comparative Administration, Arusha, Tanzania, September 1971.

20 See W.E.Ward and L.W.White: East Africa: A Century of Change, 1971.

21 *Supra*.

22 Cited in G.W. Kanyeihamba, PH.D thesis, op.cit. page 359.

23 Cited in G.W. Kanyeihamba, PH.D thesis, op.cit. page 680.

24 e.g McAustan, J.P.W in *East African Law Journal*, Volume 2, page 179. *The Evolution of Public Law in East Africa in the 1960s*. "Public Law" Summer, 1979; Leys, Colin: *Politics in Kenya: The Development of Peasant Society in British Journal of Political Science*, July 1971, Volume 1, page 313; Kasfir.N. *Political Problems in Planning: Makerere Political Review*, Volume 1(1), from page 1; Chick. J.D: *Class Conflict and Military Intervention in Uganda in Journal of Modern African Studies*, Volume 10 number 4, pages 634-637; Allott.

superficial and speculative. One of the main criticism against the latter category is that they are often motivated by a strong desire to be appreciated by readers in the developed countries rather than by a sincere mission to assist in the development of the country of study and research.²⁵ One expatriate senior civil servant with his heart in Africa once observed;

“I think more and more government departments are now coming to the conclusion that we have gone in too freely for what are often incorrectly called experts from outside to help us with our problems. As soon as an expert is known to be coming, all the difficult decisions connected with his inquiry tend to be postponed. After he arrives, the expert consumes much time gathering local knowledge. Too often his report is hastily prepared and does not take due account of local realities.”²⁶

Another criticism against expatriate research findings is that they tend to overgeneralise and simplify the complex problems of the Continent's development. Often the research project is based on one small area or section of the community but the findings are applied generally to the whole country, and in some cases, to the rest of Africa, often without allowing for any margin of error or variation.²⁷

The expatriate researchers who have scored high marks and whose findings have been very instrumental in development, have been those who chose to select local counterparts or assistants with whom they corroborated in the research efforts. They have had two advantages. The first is that their research results are legitimized and credible because of the participation and contribution from the indigenous associates and scholars. Secondly, by associating with and working closely with local personnel instead of aiming at working alone in the field and gaining academic honours, the expatriate scholar in this category is planting the seeds of future research which may be sustained and nurtured after his or her departure from the host country.²⁸

Recent studies in development have revealed acute shortages of funds, materials and planners in Africa. The few available are loaned through aid and development programmes supported by foreign funds. Fred Riggs once observed:

N.R: *Legal Development and Economic Growth*: Allen Unwin London, 1970, Twining William: *Legal Education Within East Africa in Commonwealth Law Series* number 5 page 115, amongst others.

- 25 See Crooks R.J. *Planning For Developing Countries*, *British Planner and Planning Institute*, UN. Statistical Yearbook, 1968, New York.
- 26 In a confidential Note to the Minister of Finance, Confidential Files, F.C. 3063, 15 December 1963, Kampala. Also see G.W.Kanyeihamba, PH.D thesis, op.cit. page 357.
- 27 Sawyerr F.G.A: *Review of the Conflict of Laws in Ethiopia*, E.A.L.J, Volume 1 number 4, (December 1965) at page 315.
- 28 Ghai Y: *Research on Law and Development in Africa*, Conference Paper, International Legal Center, New York, 1972.

“Alien models are deliberately and sometimes even vigorously thrust upon local policy-makers by foreign organizations as well as by the United States, and other bilateral aid programmes, provided the funds and resources for such efforts. The possibility of obtaining foreign aid (with its three P’s: Participation, Posts and Paraphernalia) readily tempts decision makers especially when they are not subject to strong domestic counter pressures to adopt the foreign models.”²⁹

Some of the aid programmes are intended to further the political, military or economic interests of the donor countries. Thus, Dr Andrew McKmark of the World Bank once observed:

“Probably only the international and multilateral aid programmes can be described without reservation as being wholly devoted to economic development. They are unlike the bilateral programmes which often stress promoting the sale and distribution of their products abroad by tying aid. This frequently means that the developing country does not have a chance to choose the most suitable and least expensive goods on the world market, nor to encourage its own import-substituting industries.”³⁰

On UN and other multilateral projects, it is not unusual for experts, representing as they sometimes do, different disciplines, cultures and ideologies, to disagree on what they are supposed to do for the host country. They may further be handicapped by lack of coordination and the insufficient time availed to them to appraise and appreciate local conditions and circumstances.³¹

10.5 AFRICAN WEAKNESSES IN NEGOTIATING CONTRACTS

In Africa we are concerned mainly with export of agricultural products.³² Apart from items such as timber and minerals, most of Africa’s exportable commodities are perishable. Many experts believe that the less developed countries especially of Africa benefit very little from international trade, partly because they export primary (unprocessed) commodities and partly of inadequate knowledge and experience in the art and techniques of negotiation. Perishable goods cannot be exported on the long transit period basis. Insurance is often prohibitive.³³

Developed countries of the world which have been in the business of international trade for a long time are more experienced and possess enormous advantages over those of Africa. The old colonial patterns remain and may have

29 In Administration in Developing Countries, Houghton Niffin, 1964.

30 The Economics of African Development, Fredrick .A. Praeger, New York, 1967, page 293.

31 Richard Gott n the Guardian of London, 18 October 1972.

32 See Kiwelo P.F: The World Trade Organisation (WTO) for Whose Benefit? The Uganda Living Law Journal, Volume 1 number 2 December 2003, page 216.

33 For insurable risks: see P.S.Atiyak, Accidents, Compensation and the Law, 2nd ed. Weldenfeld and Nicolson, London, Reprint 1978, page 12.

been strengthened notwithstanding that African countries are now supposed to be independent and sovereign.³⁴ The negotiators from developed countries identify and concentrate on decision makers instead of negotiating directly with local experts and professionals. Instead of seeing the minister responsible for trade, the foreign trader insists on seeing the President who is tricked into directing the minister to deliver to the trader what he or she wants instead of negotiating with them first.³⁵

Many of the African bureaucrats who are responsible for final decisions in trade lack adequate knowledge and expertise as well as experience in the art and techniques of negotiation. Lack of experience in the art of negotiation and failure to cater for all the eventualities in the contract agreement can result in a catastrophe for the parties affected as evidenced by the tragic case of Bhopal which is ably narrated in a book called “**Anatomy of a crisis by Paul Shrivastava**”³⁶

Offers of bribes and the bribers themselves tempt African negotiators to undersell and cheat their nations. Examples of such corruption are wide spread throughout the continent and so Africa never gets what it deserves.³⁷

The strengths of the sellers and buyers with whom Africans deal overwhelm the efforts of their counterparts in Africa. There are numerous tricks used by foreign negotiations on trade to hoodwink and sometimes to deceive African traders, especially when the Africans go abroad to negotiate trade for Africa. On 8 July 2005, Dr John Kabayo, one of the great Uganda scientists had his letter published in the new vision with the message; “*Being a subject of pity has prevented Africa from examining herself and providing her own prescriptions.*”³⁸

In advocating for a reappraisal of the paths Africa has been taking in her efforts to avoid the dependence syndrome so that she may stand and operate largely on her own efforts, the following may be useful guidelines:

1. As Africans, we have not learned or grasped the importance of patriotism and loyalty to the countries of birth or nationality or our people. Some of our officials sacrifice these attributes very cheaply and easily for so little.

34 Andreshi, Slanislav: *The African Predicament*, Alertlon Press, New York, 1969.

35 In Uganda under both President Godfrey Binaisa and President Yoweri K. Museveni. Foreigners preferred dealing with the President directly rather than with the line Ministry. The consequences were always almost disadvantageous to Uganda.

36 Published by Ballinger Publishing Company, Cambridge, Massachusetts, 1987.

37 See the World Bank Reports on several African Countries of 2001 – 2005.

38 Former MP in the Uganda Parliament of 2001–2006 (resigned) but now a Parliamentary candidate in the February Parliamentary elections.

2. We need to establish special educational institutions where international trade and the art of negotiation are taught.
3. Books and other forms of literature on trade and the art of negotiation must be acquired for compulsory reading by those who represent and negotiate for Africa.
4. Officials who cause loss to the nation through international trade compromises should be severely punished and certainly removed from their respective positions as a matter of the utmost urgency.
5. Trade officials should be subjected to a **strict code of ethics and integrity** and be **periodically monitored** and reported on and where they are suspected on reasonable grounds of incompetence and abuse of office, they **should be removed at once**.³⁹
6. **Foreigners who** are discovered attempting to **compromise African interests or who corrupt trade officials** should be **blacklisted and prohibited from trading with Africa**.
7. Every African state should create a **cadre of officials who specialise in international trade, negotiate collectively**, and consist of multi- departmental teams including competent and experienced government lawyers. These teams should be engaged in this area for limited periods of time in order to guard against complacency and temptations of familiarity and corruption.
8. There should be periodic **retraining and refresher courses for all trade and commercial officials**, attended, amongst others, by representatives of **chambers of commerce and manufacturers' associations**.
9. African Broken Promises

There is a saying that a broken promise is a debt owed and not paid.⁴⁰ There has been failure among many African leaders to recall, keep or sustain their solemn promises which they made before or shortly after coming to office.⁴¹ They ignore or deliberately betray those promises when they discover that perpetuating themselves in public office is sweeter than honey. They completely ignore the wise counsel of compatriots with whom they struggled for power under the slogan of liberating their respective countries from the evils that they themselves now begin to wallow in. Anyone whether friend or foe who dares question their inexplicable change of mind becomes not their political opponent, but their sworn personal enemy.⁴² Constitutional instruments which they inspired and, the making of which they were the champions who swore to uphold and protect the same to death,

39 It is not unusual for public servants who are alleged to have committed offences in one department of Government to be casually transferred to another without any serious reassessment of the suspect.

40 In the Daily Monitor Newspaper, 23 February 2006.

41 See Daily Monitor Newspaper, 5 December 2005 page 2.

42 See East African Weekly of 20 – 26 February.

become useless and irrelevant when they appear to be in their way of continuing in office indefinitely.⁴³ The earlier promises of liberating the country from anarchical rule, from dictatorship and from corruption become distant historical embarrassments to be forgotten or corrected at any cost.⁴⁴

In his introduction to "Constitutionalism" in East Africa, Benson Tumasirwe astutely observes:

"Inevitably, at some stage one begins to worry whether the East African region is not in danger of getting obsessed with constitutional amendments for its own sake. There seems to be an all pervasive assumption that the problem with the politics of the region has a lot to do with the provisions of the constitutions of the respective countries. This may not necessarily be the case. If the post-independence history of the region has demonstrated anything, it is that the most elaborate constitutional provisions may not be worth the paper on which they are printed, unless there is a corresponding will to observe and respect them. Thus, the fact that Uganda has gone through endless political unrest while Tanzania has enjoyed uninterrupted stability, does not mean that the latter has the best-crafted constitution while the former has the worst. Since 1991, when the Kenya Constitution was amended to allow multi-party politics, Kenya had, on paper, a generally more democratic constitution than Uganda and probably Tanzania. However, on the ground, this did not turn Kenya into a democracy. Consequently, in matters of constitutionalism, democracy, the respect for human rights and the rule of law, legal provisions only tell half the story."⁴⁵

It cannot be doubted that Tumasirwe's observation applies equally to many more African states than he has enumerated in his article.

On the day, the 1995 Uganda Constitution was promulgated, the country's top executive and legislative leaderships hailed the new Constitution as the best Uganda has ever had. Some of the leaders solemnly swore that they would fight anyone who attempted to tamper with it.⁴⁶ Hardly ten years have passed since that day and the same group of people and others have decided that the same Constitution is not good enough for transient and personal reasons and that it should be overhauled.⁴⁷ In Kenya, a Constitutional Review Commission which carefully and diligently worked and produced a national consensus on new Constitutional amendments stalled simply because some influential leaders in that

43 At page 4, Fountain Publishers, Kampala, 2005.

44 Since announcing that he would go for a third term as President of Uganda in 2004, the national Newspapers have periodically catalogued the broken promises he made.

45 Page 4: In speeches made at the time of promulgating the Constitution in October, 1995. See Proceedings of the Constituent Assembly of September and October, 2005. Also see the Preamble to the Constitution.

46 The amendment Bill, 2005.

47 Report of ICJ, Kenya Section, op. cit..

country felt that the Draft Constitution did not fully cater for their personal interests.⁴⁸

10.6 CONSEQUENCES OF FAILURE

In my book, *Constitutional Law and Government in Uganda*, 1975, I examined the reasons for military *coups de'tat* in the world which bring military men into government and observed:

“Once they have tested the sweetness of power, the soldiers become reluctant to relinquish the reins of government. The desire to continue in office remains long after the motives for which they usurped power have ceased or ought to have ceased. The desire to stay in office becomes their aim and the agony of the civilians is how to remove them from there.”⁴⁹

However, African political leaders have fared worse in their attempts to cling to power.⁵⁰ They and their immediate supporters never seem to realize the damage they do to the dynamic development of their respective nations in all its manifestations whether political, social or economic.⁵¹ For the longer they stay in power, the less innovative and efficient they become. Selfish and personal interests slowly but surely supercede those of the nation and fellow citizens.

Uganda is a typical example of this syndrome. The Idi Amin regime took power in Uganda in 1971 with the stated intentions of staying for a very short period while “cleaning” or preventing the country from continuing with the misdeeds of the previous government. It listed 18 reasons for ousting Milton Obote from power. By the time Idi Amin was himself ousted nearly nine years later, he had not only committed graver mistakes but they had increased more than tenfold.⁵²

The following description of why President Obote fell from power can be applied to many typical authoritarian regimes and African leaders. In this paper, I wish to narrate the consequences of failure by using the reasons for the overthrow of the first Government of Dr Milton Obote who assumed power after he had been elected on popular and socialist policies. Initially, the Obote Government administered the country well. Over several years, it slowly became intolerant of

48 Published by E.A.L.B, Nairobi, page 140.

49 Several who declared themselves Presidents for Life never made it and others who attempted to cling to power failed. The list is too long to be included in this short essay.

50 The designs and efforts to cling to power become the most important and priority areas to which national resources are devoted until the goals are achieved or defeated.

51 See Kasozi A.B.K: *The Social Origins of Violence in Uganda*, Fountain Publishers Ltd, Kampala, 1994.

52 Mamdani Mahmood and Oloka-Onayngo, Joe, (eds.) *Uganda*, JEP Books 12, Vienna, 1993.

opposition then became unpopular and eventually was deposed by the Army in a move that was welcomed by many in the country. Around 1969, there was no indication that the Obote Government would fall from power. On the contrary, at the time, it was the opinion of most observers that besides the regime of the then apartheid of South Africa, the Obote government was one of the safest South of the Sahara.⁵³ President Milton Obote had no visible rivals for power. Uganda was so much identified with him both internally and externally, that the only question was who would replace him if he were to die in office rather than when he would give way to another alternative leader.⁵⁴ At one time, Obote himself had expressed the view that he was one of very few African leaders who did not fear a *coup d'état*. It is possible that by this he meant that he would not refrain from doing what he considered to be right for fear of a *coup d'état*, but certainly there were reasons for his optimism.⁵⁵ In Africa few leaders may last long without the support of the Army. He had that support. The security forces were still led by the same officers who had helped him to overthrow and crush the Buganda Kingdom – a kingdom he feared most because it never loved him.⁵⁶ Moreover, the majority of the officers and soldiers of the Army and Air Force consisted of men who had been recruited from his own ethnic group and, therefore, could be expected to support him in any internal political confrontation. Before the *coup*, he had reorganized the armed forces in such a way that only loyal officers who could be trusted commanded the strategic units and departments. The same could be said of the Police Force and the Prisons Service. The security forces were very well remunerated and facilitated. Over a period of years, the President and his closest associates had so managed to build up a corps of government spies under the auspices of the so-called General Service Department that every public officer was closely watched and reported on.⁵⁷ The effectiveness of this department was further consolidated by arming its personnel with modern weapons and putting at its disposal almost unlimited funds and vehicles. Members of the General Service penetrated not only the Civil Service, the ruling UPC party and the Cabinet but the Judiciary, the Police and the Armed Forces as well. The power of the National Assembly had been so effectively

53 See Hansen Holger Bernt and Twaddle Michael: *From Chaos to Order*: Fountain Publishers and James Currey, Kampala and London, 1995.

54 See G.W.Kanyeihamba: *Constitutional Law and Government in Uganda*, op.cit. page 453-5.

55 This hatred did not abate with the long stay of Dr Obote in exile in Zambia where he was eventually rushed to South Africa and died under treatment. When his body was returned to Uganda, very few Baganda mourned him and many were jubilant at his death.

56 Effectively managed by DrObote's Cousin: Akena Adoko.

57 In 1966, one member of Parliament who had been abroad when the so called Uganda Pigeonhole and controversial Constitution was promulgated was asked whether he approved and, without hesitation, he remarked that although he had not read its contents since it is the leaders of his party the UPC who had engineered it, he approved of it 100%.

eroded and neutralized that in most cases the government ruled without it. Often Parliament rubberstamped the governments' whimsical wishes.⁵⁸ Frightened of the General Service and lacking in personal courage and convictions, most members of Cabinet gave way to whatever the President or his closest advisers wanted done. The local administrations and regional authorities had been stripped of their powers and influence so much so that whatever came from the central government automatically formed part of the fabric of society without much formality. Thus on the face of it, the Obote government was invincible.

The question is what went wrong? It has been suggested that foreign powers were behind the Army *coup* and this appeared to be the case within a few days of the *coup*. For instance, the first voice to be heard on Radio Uganda after the *coup* was that of an unidentified non-African male person.⁵⁹ The new Military Head of government, Idi Amin was seen driving around the capital Kampala in the company of two foreign army officers. Later, at a Press conference, Idi Amin was asked whether foreigners were behind the *coup* and his answer was that it was his predecessor, Obote who had brought them in the country in the first place. These incidents were later explained away by the military government and there has been no evidence to suggest that the armed forces were assisted by foreign powers in ousting the government from power.⁶⁰ Later, after giving a lecture on the events of the *coup d'état* one historian was asked this question, and his answer was that anyone familiar with political events in Uganda could not seriously suggest that it needed foreigners to overthrow Obote and his regime.⁶¹

It can be said that President Obote was overthrown because his policies alienated him from the thinkers, the businessmen and the majority of the people who influenced events in the country such as the intellectuals, the students, the politicians and the religious groups. These were some of the people who had made the country what it was during the time he ruled. Whatever policies the government pursued could only be effective if prior consultations with and the consent of these people were sought and obtained. But no real consultations were made and no consent was given or deemed necessary. Yet, underneath the political glamour of the President and his close associates, the influence of those he ignored loomed large. Instead, Dr Obote preferred to consult theoreticians, fortune

58 This was later satisfactorily explained that the expatriates were technical advisers who happened to be caught up in the events.

59 Even the severest of critics of the Amin regime concede that the Coup d'état was internally led. See Prof. M.Kiwanuka in his remarks to the Press at the time of the Coup reported in G.W.Kanyeihamba's Constitutional law and Government of Uganda, op.cit. page 452, also legal Notice number1 of 1971.

60 Professor M. Kiwanuka, *ibid.*

61 See Argus 19 August 1971.

hunters, the boneless and the yesmen. These were people who knew little, if anything at all, about what the country really needed but who could beguile and bribe the masses and flatter the President. Some of the people the President associated himself with and sought advice from, lacked integrity and conviction about the policies they advised him about. Yet integrity and conviction of purpose were the more necessary for the policies he was pursuing.⁶² There are two ways in which a policy which is controversial can be effectively carried out. The policy-maker must either obtain the consent of the people he considers most influential and to whom the policy is to apply or if such consent is not forthcoming, the policy must be such as will appeal, in a most convincing manner, to those it is intended for. The Obote government failed to do either. It attempted to pursue the same policies as Nyerere's Tanzania without the same convictions which had enabled the latter to apparently succeed.⁶³ The ministers in the government spoke with the common man's language but preferred the company and luxuries of the successful businessman. They condemned the big businessman without proving to the ordinary man that they themselves were not big businessmen. In the end, the ordinary man or woman considered them cheats and viewed their policies with cynicism.⁶⁴ This was not because the ordinary man did not want socialism or wish to see the big businessmen controlled, but because he realized that the leaders he expected to protect him against exploitation were, in fact, collaborators and strange bed-fellows with the master exploiters. The only difference was that the leaders were his fellow countrymen who hoped that he would be deceived in accepting them as liberators.

It can further be argued that President Obote failed because he surrounded himself with the wrong kind of advisers. There were, within his government, persons who were not fit to hold high offices of state. These were often talked about and discussed in public and the President must have heard; but he did not act.⁶⁵ Some ministers got themselves so much involved in various public scandals that had he removed them from the office, his public image would have improved. On the other hand, those he did decide to remove from office were of such standing, and the causes for their removal of such a nature that they instantly became heroes in the eyes of right thinking Ugandans while the President and the people he protected became villains. Indeed, at times it looked as if to be involved

62 East African Standard, 29 October 1970. The People Newspaper, 10 March 1971.

63 See Kasozi, A.B.K: *The Social Origins of Violence in Uganda*, op. cit. ch.3.

64 Byrd, O.Robert: *A Portrait of Leadership in a New Nation: The case of Uganda in Queen's Quarterly*, 69. number 4, 1963, 521 – 36.

65 Chick, John. "Uganda: The Quest For Control, in the World Today, 26, number 1, January, 1970, pages 18 – 28.

in public scandal and to be a failure in life were good qualities for which one could be appointed to high office. It has been said that the President feared to appoint talented people to public office. This is evidenced by many examples. In addition, it can be said that the President feared to annoy some of his close associates because they were in a position to damage him politically. It was rumoured that at one time he decided to reshuffle Cabinet and appoint new capable ministers. He introduced a paper at a Cabinet meeting, which contained his suggestions for a reshuffled government. Some politically powerful ministers refused to accept his proposals, and in fact one is alleged to have gone ahead and tore that piece of paper in front of the President. The matter ended there. But under the circumstances, the country needed a President who could act decisively in the public interest and whose vision was not merely for his survival but for the good of the country as a whole.⁶⁶

Milton Obote was an astute politician, but as a judge of character and the public mood he lacked the necessary qualities. Because it was more concerned with staying in power than with the proper administration of state affairs, his government was extremely sensitive to criticism in a negative sense. To them, criticism was anathema. Although welcoming it in theory and publicly, they privately identified criticism with total opposition to the regime opponents were branded traitors and enemies of the state. The only public discussion that was welcomed was the one which praised government policies and boosted the ministers' personal standing in the country. For this purpose, pre-arranged public meetings, rallies, discussions on the television and radio were held. Only comments that were favourable to the government ever found space in the government support newspapers. Only persons who strongly supported government policies dominated the discussions even though they were not always the experts in the topics they were discussing. Any one who was not prepared to sacrifice professional judgment and accuracy at the expense of blind praise of government policy might not be invited again.⁶⁷ The notion of government by discussion turned out to be a very good trick, for the government would decide on a certain policy and then publish it for public comment. The policy would be critically analysed by expert observers. Suggestions for improvement would be made. Later, the government would enact a law incorporating its policy in its original form without taking into account the criticisms and suggestions that were made by others to improve it. In

66 Disclosure by Honourable Aggrey Awori, now member of Parliament, at the time of Dr Obote's overthrow, Director of Uganda Television.

67 The author was one of the victims. Having questioned the Minister of Internal Affairs on TV discussion on corruption in the Immigration Department, he was never asked to participate again in the TV debate in the remaining years of the Obote Government I.

effect this was no more than government by information. It is not an exaggeration that some governments in Africa today rely heavily on people they have blinded or corrupted and not on the basis of reason or development. In Africa today, the numbers' game has become a substitute for reasoned democracy and national interest. The question today is do I have the numerical numbers to do what I desire rather than am I doing the right thing correctly and in the national and developmental interest.⁶⁸

The foregoing analysis provides the background and constitutes the surrounding circumstances which justified the military *coup* in Uganda in 1971. It laid the foundation upon which the popularity of the new leaders was to be built. It was to provide the rationale for political legitimacy of the military government that succeeded Obote. It would make impotent those individuals who were determined to work for his return to power. Some Ugandans have been amazed how prophetic this description of the 1970s reflects much of what has subsequently occurred since in Uganda in particular and in Africa generally.⁶⁹ The fate of the Obote government typifies many governments and leaders in Africa today. It can be used as a measuring scale for the misrule that tends to characterize much of Africa.

It may be recalled that world economic statistics and forecasts collectively and overwhelmingly identify Africa as the richest continent on earth in terms of its natural resources and yet today the richest countries of the world meet often to see how much of the crumbs under their tables can be spread and sent to Africa for the very survival of its people.⁷⁰

The youth are urged to rethink and reappraise the paths Africa has been taking and consider seriously to abandon them and adopt new ways the mother continent may take now to avoid the dependence syndrome so that she may stand and operate largely on her own efforts.

68 The number games were effectively utilised by the NRM leadership in its drive to have the referendum of 2004 held and the amendment of the 1995 Constitution to enable it to stay in power.

69 A study of Uganda, Kenya and Zimbabwe will reveal similarities between this phenomenon and what is presently practised by the three arms of government in those Commonwealth Countries.

70 Kibara Gichira: the State of Constitutionalism in Kenya, in *Constitutionalism in East Africa*, op. cit. page 76.

KANYEIHAMBA'S COMMENTARIES ON LAW, POLITICS AND GOVERNANCE

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